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"GO WEST, DISAPPOINTED HEIR": TORTIOUS INTERFERENCE WITH EXPECTATION OF INHERITANCE—A SURVEY WITH ANALYSIS OF STATE APPROACHES IN THE PACIFIC STATES

by
Diane J. Klein[*]

This Article is the fifth piece of a nationwide survey and analysis of tortious interference with expectation of inheritance, which offers a civil remedy to a person who believes that another has wrongfully interfered with an inheritance, legacy, or lifetime gift the donor intended the aggrieved person to receive. This in personam remedy is awarded by the civil court, not the probate court, and damages are paid by the tortfeasor, not the estate. To some courts and commentators, the need for such a cause of action is obvious, and acute: a variety of wronged persons, who lack standing in the probate court or are otherwise unable to prove up their legacy there, are left remediless without the tort, while wrongdoers can act with impunity. To others, the tort is an equally obvious improper and unnecessary incursion on the probate court's special procedures and evidentiary requirements, developed over centuries for determining whether testators and trust settlors have made valid and enforceable gifts, and distributing their assets accordingly.

This short Article surveys and analyzes the cases from Oregon, which recognizes the tort; and California, Hawai'i, and Washington, which do not. (Alaska has no cases yet mentioning it.) The Article includes a comprehensive and up-to-date state-by-state listing of cases involving the tort.

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I. INTRODUCTION

For just how long can a tort be considered "new"? An early version of tortious interference with expectation of inheritance was recognized in 1834,[1] and the *Yale Law Journal* published a brief comment about the tort in 1917.[2] "Intentional interference with inheritance or gift" was added to the Restatement (Second) of Torts, at § 774B, in 1979. Twenty-five of the forty-two states that have considered it have validated it.[3] In 2006, the United States Supreme Court called it "widely recognized."[4]

And yet, as recently as twenty years ago, fewer than ten states made any legal remedy available to a person injured by the intentional interference of another with his or her expectation of an inheritance or

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[1] *See* Heirs of Adams v. Adams, 22 Vt. 50, 51 (1849) (citing an unreported 1834 case, Mead v. Heirs of Langdon).

[2] M.B., Comment, *Tort Liability for Depriving the Plaintiff, Through False Representations, of an Expected Inheritance*, 27 YALE L.J. 263 (1917).

[3] They are Colorado (Lindberg v. United States, 164 F.3d 1312 (10th Cir. 1999) (applying Restatement (Second) of Torts § 774B)); Connecticut (Benedict v. Smith, 376 A.2d 774, 775 (Conn. Super. Ct. 1977), *but see* Moore v. Brower, No. X10UWYCV054010227S, 2006 WL 2411382, at *1 (Conn. Super. Ct. Jul. 26, 2006)); Florida (DeWitt v. Duce, 408 So. 2d 216, 218 (Fla. 1981)); Georgia (Mitchell v. Langley, 85 S.E. 1050, 1050–51 (Ga. 1915), *but see* Copelan v. Copelan, 583 S.E.2d 562, 563 (Ga. Ct. App. 2003)); Idaho (Carter v. Carter, 146 P.3d 639, 647–48 (Idaho 2006), *but see* Losser v. Bradstreet, 183 P.3d 758, 763 (Idaho 2008)); Illinois (Nemeth v. Banhalmi, 425 N.E.2d 1187, 1190 (Ill. App. Ct. 1981)); Indiana (Minton v. Sackett, 671 N.E.2d 160, 162 (Ind. Ct. App. 1996)); Iowa (Huffey v. Lea, 491 N.W.2d 518, 520 (Iowa 1992)); Kansas (Axe v. Wilson, 96 P.2d 880, 888 (Kan. 1939)); Kentucky (Allen v. Lovell's Adm'x, 197 S.W.2d 424, 425–26 (Ky. 1946)); Louisiana (McGregor v. McGregor, 101 F. Supp. 848, 849–50 (D. Colo. 1951), *aff'd*, 201 F.2d 528 (10th Cir. 1953) (probably applying Louisiana law)); Maine (Cyr v. Cote, 396 A.2d 1013, 1018 (Me. 1979)); Massachusetts (Labonte v. Giordano, 687 N.E.2d 1253, 1255 (Mass. 1997)); Michigan (Creek v. Laski, 227 N.W. 817, 818, 820 (Mich. 1929), *but see* Dickshott v. Angelocci, No. 241722, 2004 WL 1366001, at *16–*17 (Mich. Ct. App. June 17, 2004)); Missouri (Hammons v. Eisert, 745 S.W.2d 253, 258 (Mo. Ct. App. 1988)); New Jersey (Casternovia v. Casternovia, 197 A.2d 406, 409 (N.J. Super. Ct. App. Div. 1964)); New Mexico (Doughty v. Morris, 871 P.2d 380, 383 (N.M. Ct. App. 1994)); North Carolina (Dulin v. Bailey, 90 S.E. 689, 689–90 (N.C. 1916)); Ohio (Firestone v. Galbreath, 616 N.E.2d 202, 203 (Ohio 1993)); Oregon (Allen v. Hall, 974 P.2d 199, 202 (Or. 1999) (en banc)); Pennsylvania (Cardenas v. Schober, 783 A.2d 317, 327 (Pa. Super. Ct. 2001)); Texas (King v. Acker, 725 S.W.2d 750, 754 (Tex. App. 1987)); Vermont (Heirs of Adams v. Adams, 22 Vt. 50, 51 (1849) (citing Mead v. Heirs of Langdon (unreported))); West Virginia (Barone v. Barone, 294 S.E.2d 260, 263–64 (W. Va. 1982)); and Wisconsin (Wickert v. Burggraf, 570 N.W.2d 889, 890 (Wis. Ct. App. 1997)).

[4] Marshall v. Marshall, 547 U.S. 293, 312 (2006).

legacy. Fifteen states have explicitly declined to do so.[5] The Pacific states—California, Oregon, Washington, Hawaii, and Alaska—are typical in being divided.[6] Each state must determine for itself whether the value of providing a remedy in civil court for disappointed heirs (and punishing those who injure them) warrants the inevitable incursion on the exclusive jurisdiction of the probate court represented by the tort. Something about striking that balance in favor of the tort is troubling to a significant number of courts.

One reason for the courts' collective ambivalence may be that the probate court is one of the last remaining legal spaces primarily concerned with determinations of status.[7] In what must be one of the most oft-quoted lines in legal history, Sir Henry Maine remarked that, "[W]e may say that the movement of the progressive societies has

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[5] They are Alabama (*Ex parte* Batchelor, 803 So. 2d 515, 518–19 (Ala. 2001)); Arkansas (Jackson v. Kelly, 44 S.W.3d 328, 328 (Ark. 2001)); California (Jones v. Welchner, No. H029511, 2007 WL 2751429 (Cal. Ct. App. Sept. 21, 2007)); Delaware (Chambers v. Kane, 437 A.2d 163, 164 (Del. 1981)); District of Columbia (*In re* Estate of Reilly, 933 A.2d 830, 834 (D.C. 2007) (granting summary judgment on the basis that the tort is not recognized), *but see* Ingersoll Trust v. Ingersoll, 950 A.2d 672, 699–700 (D.C. 2008) (assuming without deciding that the tort is recognized, though denying recovery)); Hawaii (Foo v. Foo, No. 24158, 2003 WL 220495, at *1 (Haw. Ct. App. Jan. 10, 2003) (unpublished table decision)); Maryland (Geduldig v. Posner, 743 A.2d 247, 255–57 (Md. Ct. Spec. App. 1999)); Minnesota (Botcher v. Botcher, No. CX-00-1287, 2001 WL 96147, at *2 (Minn. Ct. App. Feb. 6, 2001)); Montana (Hauck v. Seright, 964 P.2d 749, 753 (Mont. 1998)); New York (Vogt v. Witmeyer, 665 N.E.2d 189, 190 (N.Y. 1996)); South Carolina (Douglass *ex rel.* Louthian v. Boyce, 542 S.E.2d 715, 717 (S.C. 2001)); Tennessee (Stewart v. Sewell, 215 S.W.3d 815, 827 (Tenn. 2007)); Virginia (Economopoulos v. Kolaitis, 528 S.E.2d 714, 720 (Va. 2000)); and Washington (*In re* Estate of Hendrix, Nos. 55711-4-I, 55782-3-I, 2006 WL 2048240, at *1 (Wash. Ct. App. July 24, 2006)). Two others have explicitly declined to decide: Oklahoma (*In re* Estate of Estes, 983 P.2d 438, 442 n.2 (Okla. 1999)) and Rhode Island (Umsted v. Umsted, 446 F.3d 17 (1st Cir. 2006)).

[6] This Article is the fifth in a series of articles comprising a nationwide survey and analysis of this tort. *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 (2008) (forthcoming); 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 (2004) [hereinafter *First, Second, and Third Circuit Survey*]; Diane J. Klein, *The Disappointed Heir's Revenge, Southern Style: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Fifth and Eleventh Circuits*, 55 BAYLOR L. REV. 79 (2003) [hereinafter *Fifth and Eleventh Circuit Survey*]; Diane J. Klein, *Revenge of the Disappointed Heir: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Fourth Circuit*, 104 W. VA. L. REV. 259 (2002). This project does not include Martin L. Fried, *The Disappointed Heir: Going Beyond the Probate Process to Remedy Wrongdoing or Rectify Mistake*, 39 REAL PROP. PROB. & TR. J. 357 (2004), despite its confusingly similar title.

[7] The family or domestic relations court is another, having as it does the power to confer or withdraw the very legally-significant statuses of parent, child, and spouse (through adoption, termination of parental rights, paternity suits, divorce, etc.).

hitherto been a movement from Status to Contract,"[8] but the probate court has been among the most resistant of institutions to the movement away from status.[9] To be an intestate heir is to enjoy an unearned, unchosen status. Although the testator can choose a different devisee or legatee, that position may be similarly unearned or unchosen, from the beneficiary's point of view. Upon the death of an ancestor, one just "becomes" an heir. Hence, for example, without a "slayer's statute," a murder victim's property may pass by will or intestacy to his murderer, so separate is the killer's status as heir or devisee from the circumstances that caused that expectancy to vest.[10]

What is "tortious interference with expectation of inheritance"? It is the *wrongful* interference with an inheritance (or legacy, *inter vivos* gift, or interest in trust) that another would have received, but for that interference.[11] Not everything one person may do to divert another's inheritance his way is wrongful, of course—simply being nicer to Grandma is a time-honored way to obtain a legacy otherwise destined for another relative. But at some point, the behavior of an eager beneficiary becomes that of a tortfeasor, and tortious interference with expectation of inheritance names a wrong remediable by an in personam action for the benefit of one who can plead and prove that she was the victim of the tortious conduct of the kind described, resulting in damages. Significantly, it is not an action against the decedent or the decedent's estate. Instead, the defendant might be a person who wrongfully induced or prevented the execution or revocation of a testamentary instrument. In many cases, a person injured by this type of conduct can obtain the intended legacy through a successful challenge in probate court. For example, if the wrongdoer employed undue influence or fraud to procure a will in his favor, a successful challenge to that will "undoes" the

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[8] HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 165 (Beacon Press 10th ed. 1963) (1861) (emphasis omitted).

[9] The uneasy attitude of courts towards contracts to make, or refrain from revoking, a will illustrates the same point. Contracts of this type are enforceable, but only at law, not in probate. Thus, the effect of entering into a valid contract to make a will containing a particular disposition is not to deprive the testator of the capacity to make a different disposition, or even that an after-executed will making a contrary disposition is invalid or cannot be probated. If the person dies in breach, having made no will at all, he dies intestate, notwithstanding the contract. A will executed in breach of such a contract is still valid and probatable; the sole remedy is an action at law for damages. DUKEMINIER, ET AL., WILLS TRUSTS, AND ESTATES 286 (7th ed. 2005) ("If, after a contract becomes binding, a party dies leaving a will not complying with the contract, the will is probated but the contract beneficiary is entitled to a remedy for the broken contract.").

[10] *See, e.g.*, Owens v. Owens, 6 S.E. 794, 794–95 (N.C. 1888) (permitting wife the dower rights she obtained through a widowhood she herself feloniously created); *see also* Riggs v. Palmer, 22 N.E. 188, 191 (N.Y. 1889) (Gray, J., dissenting).

[11] Restatement (Second) of Torts § 774B.

harm. In such cases, arguably, a separate tort remedy is neither necessary nor appropriate.

But in other cases, preventing a wrongfully-procured instrument from being given effect will *not* remedy the harm. If an intestate heir of the decedent wrongfully procured a will entirely in her favor, a successful challenge to that will leaves the wrongdoer to share the estate with other intestate heirs—none of whom may be the person the testator genuinely intended to benefit. If a person depleted an estate *inter vivos* by wrongfully procuring lifetime transfers to herself, there is no suitable challenge to bring before the probate court. If the injured or excluded intended beneficiary is neither an intestate heir nor identified in a prior instrument, he or she may lack standing to bring a challenge in probate court at all.[12] To handle such situations (and many others), in which the probate court can remedy the wrong only partially, if at all, courts have fashioned both equitable and legal remedies.

The most common equitable remedy is the constructive trust, imposed upon the estate in the hands of the wrongdoer.[13] The constructive trust remedy, while useful, has certain limits, including that it generally restricts recovery to the *res* remaining in the third party's hands.[14]

The focus of tortious interference with expectation of inheritance, however, is on the legal remedy, the tort action. The most radical approach permits the injured person to elect between the probate and civil courts. In such an environment, would-be beneficiaries are allowed, in effect, to set up a will (or at least a testamentary disposition) without probate formalities or procedures, notwithstanding what happens in probate. Their only burden is to prove, generally by a simple preponderance of the evidence, both what the decedent would have done to benefit them, and what the alleged tortfeasor actually did, that did them out of their inheritance. In such a state, it would be possible for the probate court to award the entire estate to devisee X, under an uncontested will in X's favor; while meanwhile the civil court ordered X to pay damages to intestate heir Y in the amount of the entire estate, finding that X tortiously interfered with Y's inheritance by procuring the will through undue influence. In a formalistic, hypertechnical sense, such a tort judgment in personam does not involve the civil court's assertion of jurisdiction over the estate *res*, or indeed redistribute estate assets in any

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[12] For a more complete discussion of fact situations not remediable by the probate court, see *First, Second, and Third Circuit Survey*, *supra* note 6, at 247–52 and notes thereto.

[13] 5 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS 304 (4th ed. 1989) ("A constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it.").

[14] For a helpful discussion of cases employing the constructive trust remedy, see Beth Bates Holliday, *Cause of Action for Interference with Expected Gift or Inheritance*, 36 CAUSES OF ACTION 2d 1, § 51 (2007).

way (because, of course, the tortfeasor can pay from any assets, and is obligated to pay regardless of whether he has exhausted his inheritance). Yet as a practical matter, the possibility of substantively conflicting outcomes prevents most states from going this far.

Much more commonly, states that recognize the tort require the plaintiff either to have exhausted her remedies in probate court, or to demonstrate why seeking a remedy in probate court would be futile.[15] Generally this functions as a jurisdictional prerequisite, rendering the tort suit subject to a motion to dismiss for failure to exhaust probate remedies. As for elements of the tort, most states that have recognized it in recent years have adopted a version of it close to that found in Restatement (Second) of Torts § 774B. That section 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."[16] The elements are then generally identified as, "(1) a valid expectancy; (2) intentional interference with that expectancy; (3) independently tortious conduct (such as undue influence, fraud, or duress); (4) reasonable certainty that absent the tortious interference the plaintiff would have received the expectancy; and (5) damages."[17] (In what follows, any significant deviation from the Restatement version of the tort will be noted and discussed.)

Among the Pacific states, only Oregon recognizes the tort.[18] California, Hawaii, and Washington do not;[19] Alaska has no reported cases addressing it.

II. OREGON RECOGNIZES THE TORT

Nearly a decade ago, the 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."[20] As one Oregon appellate court described it, "*Allen* represents our Supreme Court's furthest extension of the tort of intentional interference with prospective economic advantage."[21]

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[15] *See* DeWitt v. Duce, 408 So. 2d 216, 218–19 (Fla. 1981), *and Fifth and Eleventh Circuit Survey*, *supra* note 6, at 112–115.

[16] RESTATEMENT (SECOND) OF TORTS § 774B (1979).

[17] Lindberg v. United States, 164 F.3d 1312, 1319 (10th Cir. 1999); *see id.* at 1319 n.5 (explicitly citing Restatement (Second) of Torts § 774B in support of multi-factor test).

[18] Allen v. Hall, 974 P.2d 199, 202 (Or. 1999) (en banc).

[19] *See supra* note 5 and cases cited therein.

[20] *Allen*, 974 P.2d at 206.

[21] Fox v. Country Mut. Ins. Co., 7 P.3d 677, 690 (Or. Ct. App. 2000) (tort's "essential purpose . . . is to protect the integrity of, and expectancies in, voluntarily-created economic relationships. . . . [E]conomic relationships . . . that would have

However, the elements of the tort as defined by the Oregon Supreme Court closely track Restatement (Second) § 774B.

Allen v. Hall presented a familiar tortious interference scenario—disappointed relatives taking on unrelated third-party caregivers. Gregory Putman, the decedent, was the uncle of Kristine Sandoz Allen and Eric Sandoz.[22] Putman was the recipient of a heart transplant, and during the last four years of Putman's life, Sheryl and Daniel Hall played an increasing role in his care.[23] On October 9, 1995, during his last illness, Putman executed a will leaving substantially everything to the Halls.[24] Later the same month, he drafted, but did not execute, a will leaving his home to the Sandozes.[25] He also consulted with a lawyer about executing the new will, but Sheryl Hall interposed herself between Putman and the lawyer, and the will was never executed.[26] Putman died on November 5, 1995.[27]

Assuming the truth of the allegations, this is a classic situation in which the probate court cannot provide a complete remedy. The wrongdoers have tortiously prevented the execution of a will (or codicil) in favor of persons who are not the beneficiaries under a prior will or intestate heirs. If we understand the case as the tortious prevention of the revocation of the prior will, we reach the same result. Denying probate to the October 9, 1995 will, not an easy result to obtain, would not benefit the Sandozes unless they were Putman's intestate heirs or beneficiaries under a prior, unrevoked instrument, neither of which is suggested by the facts.

The Sandozes brought suit in the Federal District Court of Oregon against the Halls, for "intentional interference with prospective inheritance," relating to the home they alleged would have been left to them but for the Halls' interference.[28] The Sandozes alleged specifically that the Halls had interfered through

> the most egregious of independently tortious conduct—fraud committed upon Putman's attorney to keep her from bringing the new will to her client, and personal injury inflicted upon Putman by forcing him into a medical facility and then lying in order to cut off his life support systems so that he would die forthwith and not change his will.[29]

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very likely resulted in a pecuniary benefit to the plaintiff but for the defendant's interference.").

[22] Allen v. Hall, 139 F.3d 716, 716 (9th Cir. 1998).

[23] *Allen*, 974 P.2d at 201.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] Allen v. Hall, 139 F.3d 716 (9th Cir. 1998). The basis of jurisdiction was diversity of citizenship, under 28 U.S.C. § 1332. *Hall*, 974 P.2d at 201.

[29] *Allen*, 139 F.3d at 716.

On the basis that Oregon had not recognized such a tort, the district court dismissed the case, and the Sandozes appealed to the Ninth Circuit.[30] The Ninth Circuit, in turn, certified the questions (of recognition, as well as the elements of the tort) to the Oregon Supreme Court.[31]

In its certification opinion, the Ninth Circuit usefully identified important considerations cautioning against recognition of the tort, as well as those in its favor.

> Recognition presents dangers to the enforcement of the decedent's desire to dispose of property by will, and to the orderly operation of the probate system. That may well result in the raising of claims of undue influence and the like through the medium of suing beneficiaries directly in tort, rather than attacking the decedent's dispositions themselves .... Moreover, because of the special dangers of tort litigation over what a now deceased person would have done, the tort is not like the other sorts of intentional interference torts which have been recognized in Oregon. In addition, a tort claim against heirs is quite different from a mere breach of contract or negligence action against a lawyer, who has not followed a testator's instructions. Moreover, actions which allow an heir or beneficiary to sue to set aside a fraudulent conveyance are not at all similar to this tort. They do not affect or deflect testamentary or intestate dispositions of property by the decedent. They merely bring the property back into the estate of the decedent for appropriate disposition in the usual course of things. Finally, Oregon, like other states, has made it clear that it is not inclined to allow what amount to collateral attacks on the determinations of courts sitting in probate. That insistence (along with formalities for executing or revoking wills) helps to avoid fraud, mistake, and a great deal of second guessing about what the decedent really meant to do or what he really might have done.[32]

In this discussion, the Ninth Circuit provided a good overview of the familiar dangers associated with the tort: the "end run" around, or derogation from, the authority of the probate court; the ineliminable speculation associated with determining what a decedent would have done; and the risk of frustrating, rather than furthering, a decedent's intentions ("affect[ing] or deflect[ing] testamentary or intestate dispositions"[33]). But, as the Ninth Circuit continued,

> [o]n the other hand, the trend is to give some relief where the attack is not upon what the testator did, but, rather, is based upon a

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[30] *Id.*

[31] *Id.* at 717–18. Once the tort was recognized, the Ninth Circuit reversed the District Court's dismissal in an unpublished opinion. Allen v. Hall, No. 96–35996, D.C. No. CV-96-00563-JJ, 1999 WL 173565 (9th Cir. March 24, 1999) (unpublished table decision).

[32] *Allen*, 139 F.3d at 716–17 (citations omitted).

[33] *Id.* at 717.

> claim that egregious acts by others have prevented the decedent from executing a new will or from revoking an old one. *See, e.g.*, Restatement (Second) of Torts § 774B cmt. c (1977) .... That is particularly true where, as here, the probate court is not actually in a position to grant relief. And, at least in a probate contest regarding a fraudulently revoked will, the Oregon Supreme Court has pointed out that in this area the underlying "principle is that the law will not permit improper influences to control the disposition of a person's property." *In re Estate of Reddaway*, 214 Or. 410, 418, 329 P.2d 886, 889 (1958). If the Oregon Supreme Court gave that principle sufficient weight to outbalance the dangers of allowing tort actions in this area, it would follow the trend.[34]

In this analysis, the Ninth Circuit indicated to the Oregon Supreme Court that recognition of the tort, in its Restatement (Second) version, is appropriate to ensure that the decedent's intent is carried out, particularly if procedural safeguards are put in place to reduce the threat to the integrity of the probate system. The primary such safeguard is the requirement either of exhaustion of probate remedies, or a demonstration that the probate court cannot grant complete relief, a requirement adopted elsewhere.[35]

Before answering the certified question(s), the Oregon Supreme Court first consolidated and "reframed" them slightly, as follows: "Have plaintiffs in this case, who have brought a tort action based on a theory that defendants wrongfully interfered with a prospective inheritance that otherwise would have gone to plaintiffs, alleged facts which, if proved, would form a basis for relief under Oregon law?"[36] Answering in the affirmative,[37] the Oregon Supreme Court also answered the questions as the Ninth Circuit asked them. The Oregon court stated,

> under Oregon law, an intentional interference with a prospective inheritance may be actionable under a reasonable extension of the well-established tort known as intentional interference with economic relations.
>
> ....

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[34] *Id.* (citations omitted).

[35] *See, e.g.*, Neumann v. Wordock, 873 So. 2d 502, 504 (Fla. Dist. Ct. App. 2004) (no adequate probate remedy because estate would not be distributed; no probate proceeding; no personal representative pursuing a claim); Nemeth v. Banhalmi, 466 N.E.2d 977, 989 (Ill. App. Ct. 1984) (failure to exhaust is a waivable objection); *In re* Estate of Hoover, 513 N.E.2d 991, 992 (Ill. App. Ct. 1987) (adequacy of probate remedy); Commerce Bank, N.A. v. Blasdel, 141 S.W.3d 434, 454 (Mo. Ct. App. 2004) (exhaustion of probate remedies required); Gianella v. Gianella, 234 S.W.3d 526, 530 (Mo. Ct. App. 2007) (dismissing tort since two-year statute of limitations ran and there was an adequate probate remedy); Garruto v. Cannici, 936 A.2d 1015, 1021 (N.J. Super. Ct. App. Div. 2007) (exhaustion of adequate remedies requirement).

[36] Allen v. Hall, 974 P.2d 199, 200–01 (Or. 1999).

[37] *Id.* at 201.

> Ultimately, an expectancy of inheritance is an interest that fits by logical extension within the concept underlying the tort of intentional interference with prospective economic advantage and, absent some legitimate reason for excluding it, may be deemed to be covered by that theory of recovery.[38]

Puzzlingly, although the Oregon court was reluctant to recognize a "separate and distinct claim," it was *not* reluctant to extend a protection accorded business expectancies to gratuitous transfers (such as testamentary gifts). The Oregon court then adapted the existing elements of interference with economic relations to "a noncommercial expectancy"[39] like a testamentary gift. The elements are:

> (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.[40]

In comparing these elements with those typical of tortious interference with expectation of inheritance, perhaps the most noticeable difference is that the Oregon tort requires only "improper," but not "independently tortious" or even "independently wrongful" means, or "an improper purpose." Using this version of the elements also does not provide very much detail about what sort of expectancy, in a donative context, will be sufficient to satisfy the first element.

The Halls, arguing against recognition of the tort, made the familiar argument (foreshadowed by the Ninth Circuit) that the tort frustrates the testator's intent and violates "the so-called 'testamentary intent' rule. That rule holds that for purposes of disposing of a decedent's estate, the decedent's intent is to be ascertained only from the four corners of a validly executed will, if one exists."[41] Reliance on the will is closely associated with the special role of the probate court, and the entire body of probate procedures, against what the Ninth Circuit described as "collateral attacks on the determinations of courts sitting in probate," the avoidance of which, "(along with formalities for executing or revoking wills) helps to avoid fraud, mistake, and a great deal of second guessing about what the decedent really meant to do or what he really might have done."[42]

The Oregon Supreme Court first responded with a familiar "form over substance" move—the denial that tort recognition has any impact

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[38] *Id.* at 202–03.

[39] *Id.* at 202.

[40] *Id.* (citing McGanty v. Saudenraus, 901 P.2d 841, 844 (Or. 1995) (stating elements); Uptown Heights Assocs. v. Seafirst Corp., 891 P.2d 639 (Or. 1995) (same)).

[41] *Id.* at 203.

[42] Allen v. Hall, 139 F.3d 716, 717 (9th Cir. 1998) (citations omitted).

on probate at all: "We are considering a tort action, not an action to set aside a will."[43] However, perhaps because the potential estate-shifting effects of the tort are undeniable, the court immediately offered a policy justification:

> If, as alleged here, a party has obtained the benefit of the testamentary intent rule by committing a tort against a third party, the policy of the law should be to provide an avenue for relief from the tortious act. To do so here still would give defendants all the benefits that the testamentary intent rule calls for them to receive. Once possessed of those benefits, however, defendants would be liable to respond in damages for torts that they may have committed—a separate legal inquiry with its own societal justifications.[44]

However persuaded we may be of the value of the tort, what the Oregon Supreme Court says here is question-begging. What does it mean to "obtain[] the benefit of the testamentary intent rule *by* committing a tort against a third party"?[45] If a tort, such as fraud, duress, or undue influence, was committed against the *testator*, the probate court is competent to adjudicate that. If the probate court concludes that the testator died testate under a particular instrument (or intestate, as the case may be), the devisees or heirs have then received the benefit of the testamentary intent rule. If no tort was committed against the testator (whether to induce or to prevent *inter vivos* or testamentary transfers), how could a tort have been committed against a third party, to whom one would then be liable in damages? In some situations, as we have seen, a probate proceeding cannot provide a complete remedy—for example, if the new will the testator was prevented from making benefited a third party—but in such a case, application of the testamentary intent rule will frustrate, not satisfy, the testator's intent. To do justice in such a situation requires deviating from the testamentary intent rule, because a recovery for the third party will amount to "disposing of a decedent's estate" by means *other than* "the four corners of a validly executed will, if one exists."[46] The tort itself is a critique of the so-called testamentary intent rule as exhausting the principles for guiding legally-enforceable testamentary dispositions.

The Halls' next argument, closely related but distinct, is that the legislature has set out a complete scheme for challenging a will, so "that allowing a tort action for interference with a prospective inheritance would invade the legislature's province by permitting disappointed survivors to circumvent that legislative scheme."[47] The Halls made both a separation-of-powers argument (it is the job of the legislature, not the

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[43] *Allen*, 974 P.2d at 203.

[44] *Id.*

[45] *Id.* (emphasis added).

[46] *Id.*

[47] *Id.* at 203–04.

judiciary, to identify bases and procedures for contesting a will or other disposition of decedent's property), and another variant on the argument—that the tort undermines the probate system.

The Oregon Supreme Court was unmoved.

> Although it is true that that [Oregon Probate] code strictly controls the kinds of issues that can be litigated in a proceeding to probate a will, and presumably requires plaintiffs to pursue those issues in the probate system where possible, that fact does not necessarily translate into a broader legislative purpose to deny legal significance to any other issue that might arise out of a decedent's making of, or failure to make, a will. Whether or not the probate code is or may be a "complete" legislative scheme, it is complete only within the confines of its subject matter, i.e., will contests. 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.[48]

The crucial limitation here is the idea that the probate code's subject matter is "will contests" (or more correctly, *devisavit vel non*[49]), and not, for example, the disposition of a decedent's property more generally. While Oregon's recognition of the tort is perhaps to be applauded, a greater acknowledgement of the tensions between the tort and traditional probate would also be useful.

III. STATES DECLINING TO RECOGNIZE THE TORT

Several of the Pacific states have declined to recognize the tort.

A. *California*

The very high profile lawsuit involving the late "Anna Nicole Smith" (neé Vickie Lynn Marshall) was a tortious-interference suit,[50] and since the case was tried in Los Angeles, the casual observer might have assumed that California law applied and that California must recognize the tort. Not so. The Federal Bankruptcy Court in California, presiding over an adversary action between the former Playmate and her middle-aged stepson, actually applied the substantive law of Texas in adjudicating the tortious interference claim.[51] Although the California Courts of Appeal in four of California's six appellate districts have decided cases

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[48] *Id.* at 204.

[49] "Devisavit vel non" is defined as "[t]he name of an issue sent out of a court of chancery, or one which exercises chancery or probate jurisdiction, to a court of law, to try the validity of a paper asserted and denied to be a will, to ascertain whether or not the testator did devise, or whether or not that paper was his will . . . ." JOHN BOUVIER, BOUVIER'S LAW DICTIONARY, 566 (Francis Rawle ed., The Boston Book Company 1897).

[50] Marshall v. Marshall, 547 U.S. 293, 301 (2006).

[51] *Id.* at 302.

alleging the tort, the courts have issued contradictory, and mostly depublished, opinions, which leave the state of the law quite unclear.

1. Csibi v. Fustos[52]

A Ninth Circuit case from 1982 seems to contemplate that California might recognize the tort, although the particular facts of the case required the determination of marital status and triggered a dismissal based on the domestic relations exception to federal diversity jurisdiction.[53] *Csibi v. Fustos* involved competing claims to the estate of Antal Csibi, a Romanian immigrant to the U.S.[54] Marcella Csibi (and her children), Antal's allegedly undivorced first wife, filed a diversity suit against his second wife, Gizela Fustos, alleging, inter alia, "wrongful interference with inheritance."[55]

However, the Ninth Circuit had held in *Buechold v. Ortiz*[56] that federal courts "must decline jurisdiction of cases concerning domestic relations when the primary issue concerns the status of parent and child or husband and wife."[57] *Csibi* is clearly such a case. Marcella's claim either to a share of the estate as an heir or as a tort plaintiff having a valid expectancy necessarily required a determination of her status as Antal's spouse. Such a determination is beyond the jurisdiction of the federal court and dismissal was required.[58]

The Ninth Circuit explained with some care (and understanding of the tort) why pleading tortious interference did not cure this jurisdictional defect.

> We are not persuaded by plaintiffs' assertion that there is diversity jurisdiction over this dispute because the complaint alleges a tort claim for wrongful interference with inheritance. Even if such a tort cause of action exists under the applicable law, the primary issue is still the marital status of Antal, Marcella and Gizela. If Gizela's marriage to Antal was either valid or invalid but in good faith, there could be no recovery for Marcella Csibi on either the tort claim or under the intestacy laws. Only if appellants proved that Gizela's status was meretricious would there be further inquiry as to whether the invalid marriage was part of a scheme to deprive Marcella and her children of their inheritance.[59]

Impliedly, it seems that if Marcella were able to obtain a judgment from the probate court that she, and not Gizela, was Antal's surviving spouse, she might then be poised to plead and prove the tort claim

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[52] 670 F.2d 134 (9th Cir. 1982).
[53] *Id.* at 138.
[54] *Id.* at 135.
[55] *Id.* at 135, 138.
[56] 401 F.2d 371 (9th Cir. 1968).
[57] *Id.* at 372.
[58] *Csibi*, 670 F.2d at 138.
[59] *Id.*

against Gizela, including the interesting possibility of using the invalid marriage itself to satisfy the requirement of wrongful conduct.

2. In re Legeas[60]

The first California Court of Appeals case to squarely address the tort, 1989's *In re Legeas*, recognized it.[61] The First District appellate court held: "We align California with other states which allow recovery in tort for the intentional deprivation of an expected inheritance."[62] That opinion was certified for partial publication.[63] However, when California Supreme Court review was denied, the opinion was ordered depublished.[64]

The dispute in *In re Legeas* centered on which of two wills of testatrix Margaret Legeas would be probated—a 1970 instrument substantially benefiting her niece Margaret McInerney and Margaret's husband Timothy, or a 1979 instrument cutting them out.[65] In 1983, Legeas was placed in a nursing home, and Margaret was named her conservator.[66] In that capacity, Margaret found the 1979 will and did not turn it over to the attorneys representing her as conservator.[67] After Legeas' death in 1984, Timothy sought to probate the 1970 instrument and was opposed by a beneficiary under the 1979 will, although the original 1979 will could not be produced.[68] Ultimately, the probate court found that the 1970 will had been revoked, the 1979 will had been fraudulently destroyed, and the 1979 instrument should be admitted.[69] The court also ordered the McInerneys to pay compensatory damages to cover the legal fees incurred by the proponents of the 1979 instrument and punitive damages of $150,000.[70] The issue raised on appeal was "whether the fraudulent destruction of a will is an actionable wrong for which tort recovery may be had,"[71] over and above the legacy restored by the probate of the proper will.

After surveying both general and California-specific cases disapproving fraud, especially in the testamentary context, the court stated:

> We believe it is fitting to augment these expressions of disapproving policy with a tort action for damages resulting from the fraudulent destruction, concealment, or spoliation of a

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[60] 258 Cal. Rptr. 858 (Cal. Ct. App. 1989) (depublished).
[61] *Id.* at 859.
[62] *Id.*
[63] *Id.* at 858 n.*.
[64] *Id.* at 858 n.**.
[65] *Id.* at 859–60.
[66] *Id.* at 860.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 861.
[70] *Id.*
[71] *Id.*

> will.[72] . . . [T]his conclusion is fully compatible with existing law and entails only a small extension of the frontier of common law tort remedies.[73]

The California court further justified the tort as protecting, rather than undermining, the probate court. Without the tort, "[i]f the judgment of the probate court is final, that court has been misinformed and has made irreversible dispositions on the basis of deliberate deception. The court will thus have been made the inadvertent instrument used to defraud rightful beneficiaries."[74] The court specifically endorsed attorneys' fees as a category of recoverable damages even when the fraud has been brought to the attention of the probate court and rectified there.[75] This category of damages is especially appropriate in a will destruction case because, by statute, the California legislature has made custodians of wills who fail to turn them over "responsible for *all* damages sustained by any one injured thereby."[76]

The California court also imposed a requirement of exhaustion of probate remedies "or a showing that it was impossible to obtain effective relief from the probate court."[77] This shows appropriate regard for the primacy of the probate system, encourages the plaintiff to minimize damages, and respects the special competence of the probate court on will-related matters.[78] Interestingly, the California court contemplated that an unsuccessful attempt to establish a legacy, rather than having negative collateral estoppel effects for the tort plaintiff, would be a proper way to demonstrate the inadequacy of the probate remedy.[79]

In re Legeas, although an appellate decision later depublished, nevertheless presented a well-reasoned justification for recognition of the tort in California.

3. Hagen v. Hickenbottom[80]

The next reported decision did not analyze the tort. In *Hagen v. Hickenbottom*, the grandchildren and heirs of decedent Mayme Hagen sued Terry Hickenbottom, Mayme's cousin and the beneficiary of a trust and pour-over will.[81] They alleged various theories, including one "recognized in several states but not previously validated in California—

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[72] The court had already indicated its intention to address the tort only in the context of "destruction, concealment, or spoliation of a will," and not procuring or preventing the execution, revocation, or alteration of a will. *Id.* at 861.

[73] *Id.* at 863.

[74] *Id.* at 864.

[75] *Id.* at 864–65.

[76] *Id.* at 865–66 (emphasis added) (citing California Probate Code § 320 (superseded by § 8200 (1989))).

[77] *Id.* at 867.

[78] *Id.*

[79] *Id.* at 867 (citing Creek v. Laski, 227 N.W. 817, 820 (Mich. 1929)).

[80] 48 Cal. Rptr. 2d 197 (Cal. Ct. App. 1995).

[81] *Id.* at 198.

of intentional interference with an expected inheritance or gift."[82] Hickenbottom won a summary judgment, and the California Court of Appeals for the Sixth District reversed, without addressing the tortious interference claim specifically.[83] "Hickenbottom has not sufficiently shown, in support of this summary judgment motion, that [Hagen's] case *cannot* be established."[84] *Hagen* thus appeared to leave open the possibility of a recovery on this tort.

4. Montegani v. Johnson[85]

The next California case to address the tort, 2003's *Montegani v. Johnson*, rather than following the rationale of *In re Legeas* (and impliedly of *Hagen*), refused to recognize the tort.[86] The brief opinion is another non-published California Court of Appeals case, this time from the Fifth District.[87] The plaintiff in *Montegani* alleged that the defendants had interfered with her expectations as a trust beneficiary by unduly influencing the now-deceased trust settlor to change the trust instrument to exclude her.[88] She pleaded her case as an extension of the tort of interference with economic relations, perhaps hoping the court would adopt the rationale of Oregon's *Allen v. Hall*.[89]

Instead, the court cited a number of California cases declining to extend tortious interference with economic advantage to non-commercial relationships.[90] However, the court offered no reason for not recognizing the tort on its own terms and simply stated, in a footnote, that: "*Jackson v. Kelly* [an Arkansas case] contains an excellent exposition of the reasons why it would be a bad idea to affirm a cause of action for intentional interference with a prospective inheritance."[91] The California court did not identify those reasons or put them into the context of California law. The court acknowledged *In re Legeas* only to remark that the California Supreme Court had ordered the opinion depublished.[92] Finally, the court held, "[t]he only issue raised by appellant on this appeal is whether a cause of action in tort for intentional interference with economic advantage includes interference with a prospective right to inherit. We conclude it does not."[93]

Although it is impossible to know whether the *In re Legeas* court would have extended the tort to cover interference with an expectation

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[82] *Id.* at 199.
[83] *Id.* at 209.
[84] *Id.*
[85] No. F041158, 2003 WL 21197217 (Cal. Ct. App. May 21, 2003).
[86] *Id.* at *1.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.* at *1 n.1 (citation omitted).
[92] *Id.* at *1 n.2.
[93] *Id.* at *1.

under a trust (rather than the more obvious assault on the probate system involved in fraud relating to a will), it is a far better-reasoned opinion than *Montegani*.[94]

5. In re Estate of Gobel[95]

In re Estate of Gobel is another unreported California Court of Appeals case (from the Third District), which mentions the tort without analyzing it.[96] Intentional interference with expected inheritance was one of several claims alleged by a sister and her children against her brother, the executor of their father's estate.[97] They failed to challenge an allegedly forged will timely, and the court of appeals affirmed the dismissal, impliedly imposing an exhaustion requirement even without recognizing the tort.[98]

6. Jones v. Welchner[99]

In 2007, the California Court of Appeals for the Sixth District declined to recognize the tort in yet another unpublished opinion, *Jones v. Welchner*.[100] In *Jones*, a friend of the decedent sued the testator's daughter for tortious interference.[101] The daughter's demurrer was sustained without leave to amend on the basis that the tort is not recognized in California, and the court of appeals affirmed.[102] However, the court provided the most thorough analysis of the tort since *In re Legeas*. The court cited Restatement (Second) § 774B and reviewed *Allen v. Hall*, emphasizing that Oregon recognized the tort as an extension of interference with economic relations.[103] However, the court correctly stated, "[t]o date, California courts have not formally recognized such a cause of action. Neither has the California Legislature established such cause of action."[104] Given that California law has thus far protected only commercial expectancies, "[j]udicial sanction of a legally cognizable

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[94] *Montegani* continued to be litigated through 2008, generating several opinions. *See* Montegani v. Johnson, No. F045130, 2004 WL 2426333 (Cal. Ct. App. Oct. 29, 2004); Johnson v. Montegani, No. F045130, 2004 WL 2426327 (Cal. Ct. App. Oct. 29, 2004); Johnson v. Montegani, No. F048577, 2006 WL 2474884 (Cal. Ct. App. Aug. 29, 2006); Montegani v. Johnson, 76 Cal. Rptr. 3d 621 (Cal. Ct. App. May 13, 2008). The May 13, 2008 opinion states by way of background that the demurrer (motion to dismiss) to the tort claim was granted, and affirmed by the Court of Appeals. *Montegani*, 76 Cal. Rptr. 3d at 625. Because the earlier opinion was depublished, this citation functions only as the law of the case, but it is still a recent, and negative, mention of the tort.

[95] No. C045217, 2004 WL 2810227 (Cal. Ct. App. Dec. 8, 2004).

[96] *Id.* at *1.

[97] *Id.* at *1–*2.

[98] *Id.* at *1–*3.

[99] No. H029511, 2007 WL 2751429 (Cal. Ct. App. Sept. 21, 2007).

[100] *Id.* at *2.

[101] *Id.* at *1.

[102] *Id.*

[103] *Id.* at *2.

[104] *Id.*

cause of action for intentional interference with inheritance or intervivos [sic] gift would be a dramatic departure from the type of interest historically protected by interference torts in this state."[105]

The good news is that the court at least recognized that in some situations, the probate system alone may leave an injured person without a remedy.[106] Unfortunately, the court is decades behind in its thinking about the tort, emphasizing such points as an imagined "logical inconsistency in allowing a prospective recipient of a contemplated gift to recover tort damages against a third party for intentional interference with a gift or inheritance when a prospective recipient ordinarily cannot legally enforce a gratuitous promise to make a gift where the giving was not completed."[107] In fact, there is no "inconsistency" here—recognition of the tort and refusal to enforce gratuitous donative promises both enforce the donor's last intent. One would not suggest that there is a "logical inconsistency" inherent in intentional interference with economic relations (or prospective economic advantage) because no one is obliged to enter into a contract with a particular person. That A is not obligated to go into business with B, or to leave B a legacy, does not mean it is "inconsistent" to give B a remedy against C if C wrongfully interferes with either relationship. The tort is intended to deter and punish a third-party wrong, not prevent donors from changing their minds.

The court's other objection is equally under-baked, beginning with the obvious and following it with a vague inquiry: "[I]n cases where the prospective giver has died, the decedent is no longer around to clarify his or her intentions. We query whether recognizing a tort action for interference with inheritance would disrupt the orderly administration of estates, probate of wills, or enforcement of intestate succession under California law."[108] There is an important issue concealed in these imprecise remarks. If the burden of proof of the elements of the tort is a simple preponderance of the evidence, a disappointed heir may effectively set up a will outside of probate, with very significantly less evidence than would be required in a probate court, the setting the California Legislature has designated for the determination of decedents' intentions. But exactly how does the California court see tort recognition as disrupting estate administration? How would it disrupt probate or intestate succession? Could such disruptions effectively be minimized by, for example, imposing an exhaustion requirement, a heightened burden of proof, or other procedural devices? Is some disruption acceptable in order not to let certain wrongs go unremedied? Without a much more precise account of the sort of disruption tort recognition might cause, there is no way to know whether it is the superior policy to adopt.

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[105] *Id.* at *4.
[106] *Id.*
[107] *Id.* *5.
[108] *Id.*

Californians have a right to expect a more sophisticated level of analysis than what was shown here.

The court concluded with a point made in *Montegani*, that recognition of the tort should come, if at all, from the California Supreme Court.[109] The history of the tort in California strongly suggests that unless or until that happens, no plaintiff is likely to obtain a recovery on this theory from a court in California.

7. In re Estate of Trevillian[110]

Most recently, in *In re Estate of Trevillian*, the California Court of Appeals for the Second District adjudicated a case involving a claim for, *inter alia*, "interference with inheritance rights."[111]

When real estate investor Marvin Trevillian died in 2003 at the age of 72, he left behind ex-wife Joyce, to whom he'd been married twice, first from 1953 to 1985, and then again from 1991 to 2001; four daughters in their late thirties and forties; Terri, the 45-year-old widow he'd married just two years before his death (but with whom he'd been involved since she was a teenager)—and an estate worth between $72 and $125 million.[112] Two of his daughters, who received just $100 each, and Joyce, who had been the beneficiary of a variety of pre-nuptial agreements executed before her second marriage to Marvin, sued Terri, unsurprisingly, alleging a variety of claims.[113] For our purposes here, however, only one claim is relevant, and the court disposed of it summarily:

> Appellants also contend that the trial court deprived them of their right to have a jury decide their claim for interference with the right to inherit. The tort of interference with the right to inherit has not been recognized in California. (See *Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168, 173.) We reject appellants' argument that *Hagen* impliedly recognized the viability of that tort and their alternative argument that this court should recognize that tort. There is no merit to appellants' claim that the trial court deprived them of their right to have a jury determine their interference with the right to inherit cause of action.[114]

Even if the court had been more sympathetic to the claim in general, however, it would have been unlikely to recognize it here, having already concluded that there had been no undue influence in relation to the testamentary instruments.[115]

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[109] *Id.*

[110] Nos. B187871, B188103, 2008 WL 175933 (Cal. Ct. App. Jan. 22, 2008).

[111] *Id.* at *1. The court also styles this claim "interference with the right to inherit." *Id.* at *12.

[112] *Id.* at *1–*6.

[113] *Id.* at *3–*4, *6.

[114] *Id.* at *13.

[115] *Id.* at *11 ("The record lacks evidence that Terri exerted undue influence upon Marvin").

B. Hawaii

The Hawaii Intermediate Court of Appeals case of *Foo v. Foo* involved a dispute between siblings Frank and Vera, and their brother Wendell, over assets Wendell allegedly obtained by undue influence from a marital trust set up by their parents.[116] One of the claims made against Wendell was "Interference With Inheritance Expectancy."[117] Frank and Vera alleged that their parents had intended to treat the three children equally, but Wendell convinced their mother, after their father's death, to transfer certain assets to him alone.[118] Although it is an unpublished opinion, 2003's *Foo v. Foo* expressed the Hawaii Court of Appeals' antipathy towards recognizing a tort claim arising from the alleged depletion of the assets of a marital trust. As the court expressed it, "none of this case belongs in the civil court and all of it belongs in the probate court."[119] Without a more thorough analysis, it is difficult to tell whether a Hawaii court might be more sympathetic to a tort plaintiff who had exhausted his or her probate remedies (or lacked standing in probate court).

C. Washington

The first Washington case to mention the tort, *Hadley v. Cowan*, was a 1991 appellate decision that did not make clear whether the tort was recognized.[120] But in 2006, the Washington Court of Appeals explicitly declined to recognize the tort, in a suit arising from the ultimate disposition of assets from musician Jimi Hendrix's estate.

In re Estate of Hendrix concerned the estate of James Allen ("Al") Hendrix, Jimi Hendrix's father and sole intestate heir.[121] Jimi's mother, Lucille, had a second son after Jimi, named Leon, although there were ongoing questions about whether Al was also Leon's father.[122] Shortly before Jimi's untimely death in 1970, Al remarried, and adopted his five-year-old step-daughter Janie.[123] Al's will left nothing to Leon "other than one of Jimi's gold records. Al's will left substantial amounts to his daughter Janie and his nephew Robert and also provided for other family

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[116] Foo v. Foo, No. 24158, 2003 WL 220495, *3 (Haw. Ct. App. Jan. 10, 2003).

[117] *Id.* at *3–*4.

[118] *Id.* at *1.

[119] *Id.*

[120] Hadley v. Cowan, 804 P.2d 1271 (Wash. Ct. App. 1991). The *Hadley* court indicated only that *if* the tort were recognized, the probate court would have (non-exclusive) jurisdiction to hear it. ("The [plaintiffs] claim that the probate court could not have considered actions in tort, such as . . . the tort of interference with a parent's testamentary gifts. This is not the law in Washington, however." *Id.* at 1275.).

[121] *In re* Estate of Hendrix, Nos. 55711-4-I, 55782-3-I, 2006 WL 2048240, *1 (Wash. Ct. App. July 24, 2006).

[122] *Id.* at *1, *3.

[123] *Id.* at *1. Janie was one of her mother's five children, but Al adopted only Janie. *Id.*

members."[124] Certain *inter vivos* transfers made in March 1997, as well as a codicil executed in April 1997, reduced Leon's share from 24% of Al's estate to nothing, and increased Janie's share from 38% to almost half.[125] Al died in April 2002.[126] Once Al died, Leon filed a contest about the codicil and also sued Janie for what the Washington court called "interference with an inheritance expectancy."[127] After two years of consolidated discovery, the will contest and tort suits were bifurcated, and the will contest tried first.[128] An eight-week bench trial ended with the dismissal of Leon's challenge.[129] Leon's unsuccessful will contest in turn doomed his tort suit, dismissed by summary judgment months later.[130]

On appeal, the Washington Court of Appeals began by stating that "[n]o Washington case has adopted the tort of interference with an inheritance expectancy," while acknowledging that other states have done so.[131] The court then evaluated the viability of such a tort claim after an unsuccessful will contest. Leon cited *Frohwein v. Haesemeyer*[132] and *Allen v. Hall*,[133] two cases in which the plaintiffs were able to pursue the tort without successfully contesting the will; but the court distinguished them on the basis that in *Frohwein*, the statute of limitations had run on a will contest, while in *Allen*, the plaintiffs could not have obtained a remedy through a will contest because the testator was prevented from executing a will in their favor.[134] While Leon argued that *Hadley*, the only prior Washington case to mention the tort, did not repudiate it, the court read *Hadley* to require giving res judicata effect to a will contest with respect to a later tort suit; meaning that a will contest (successful or otherwise) bars a subsequent tort suit "ar[ising] from the same nucleus of facts considered in the will contest."[135] The court concluded,

> [t]hus, on these facts—where the potential tort claimant has unsuccessfully pursued a will contest remedy—we decline to adopt the tort of interference with an inheritance expectancy. Because Leon has cited no persuasive authority to support his position that an unsuccessful will contestant may bring a tortious interference claim, we decline to recognize the tort of interference with inheritance expectancy in Washington on the facts of this case.[136]

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[124] *Id.*
[125] *Id.* at *5.
[126] *Id.* at *6.
[127] *Id.* at *1.
[128] *Id.* at *6.
[129] *Id.*
[130] *Id.*
[131] *Id.* at *16.
[132] 264 N.W.2d 792 (Iowa 1978).
[133] 974 P.2d 199 (Or. 1999) (en banc); see discussion at II, *supra.*
[134] *In re Estate of Hendrix*, 2006 WL 2048240 at *16.
[135] *Id.* at *17.
[136] *Id.* at *18.

The repeated references to "these facts" and "this case" do suggest, however, that in a different case, one more like *Frohwein* or *Allen* perhaps, the Washington court might be more inclined to recognize the tort.

The *Hendrix* court also made some strange remarks, in dicta, about the burden of proof in tortious interference cases as compared to will contests. In arguing for recognition of the tort, Leon had argued that it "provide[s] a remedy with a lower burden of proof than the clear, cogent, and convincing evidence burden in a will contest."[137] The *Hendrix* court stated instead that that heightened standard would also apply in tort cases. "Because this tort would have essentially the same effect as a will contest—overriding a will—the same elevated burden of proof should be applied in either cause of action."[138]

While that might be the approach taken should Washington recognize the tort, the *Hendrix* court is not correct in its statement that "[a]mong jurisdictions that have adopted the tort, it appears that will contests and tort claims typically have the same burdens of proof."[139] According to the *Hendrix* court,

> In some jurisdictions, preponderance of the evidence is the burden of proof for both will contests and tort claims, while other jurisdictions apply an elevated burden to both will contests and tort claims. Leon has cited no jurisdiction that applies an elevated burden to a will contest and a preponderance burden to a tortious interference with an inheritance expectancy claim.[140]

Although Leon (or his counsel) might not have found them, in fact, there are at least two such jurisdictions—New Mexico and Maine. A leading practice guide states that "[t]he standard of proof for a claim of tortious interference is a preponderance of the evidence,"[141] citing *Peralta v. Peralta*,[142] a New Mexico case, and *Breen v. Lucas*,[143] a Maine case, in support.[144] In *Peralta*, the New Mexico Court said explicitly,

> We recognize that there may be problems with the different burdens of proof required to contest a will and to establish tortious interference with inheritance when both are allowed to proceed in a single action before the district court. A claim that a will was procured through undue influence must be shown by clear and

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[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.* (citing Minton v. Sackett, 671 N.E.2d 160, 163 (Ind. Ct. App. 1996) (same non-elevated burden of proof applied to both tort claim and will contest); Harris v. Kritzik, 480 N.W.2d 514, 517 (Wis. Ct. App. 1992) (elevated burden of proof applied to both will contest and the dispositive element of the tort claim)).

[141] Beth Bates Holliday, *Cause of Action for Interference with Expected Gift or Inheritance*, 36 CAUSES OF ACTION 2d 1, § 47 (2007).

[142] 131 P.3d 81 (N.M. Ct. App. 2005).

[143] Breen v. Lucas, No. Civ.A. RE-03-19, 2005 WL 2736540 (Me. Super. Ct. July 4, 2005).

[144] Holliday, *supra* note 141, at § 47.

> convincing evidence, while a claim of tortious interference with inheritance need only be established by a preponderance of the evidence. We do not believe that the different burdens of proof necessitate different proceedings. Plaintiff will simply be required to meet the different burdens applicable to each aspect of her claim at trial.[145]

In *Wilson v. Fritschy*, the New Mexico appellate court stated, "[w]e note that a will contest in probate requires a greater burden of persuasion than an independent action in tort."[146] New Mexico clearly applies two different standards.

In the Maine case of *In re Estate of Lewis*, the Supreme Judicial Court of Maine addressed whether "the Probate Court erred in applying a clear and convincing standard of proof in determining undue influence and [whether] the proper standard is preponderance of the evidence. We have specifically stated in will contest cases, however, that '[u]ndue influence must be established by clear and convincing evidence.'"[147] *Breen*, meanwhile, applied a preponderance standard to the wrongful conduct in a tortious interference case.[148] Maine also clearly applies two different standards. Fortunately, should Washington recognize the tort, the lower courts would not be bound by this misleading dicta about burdens of proof.

D. No Reported Cases (Alaska)

Since 1998, Alaska has recognized tortious interference with contractual relations or business expectancy.[149] However, Alaska has no reported cases of tortious interference with expectation of inheritance.

IV. CONCLUSION

The five states of the Pacific region—Alaska, California, Hawaii, Oregon, and Washington—represent in microcosm the range of views taken of this tort by the state courts of the United States. While most state high courts to have considered the tort have recognized it, there is still significant, principled resistance to allowing the disappointed effectively to bypass the probate system, whatever its recognized shortcomings with respect to particular categories of wronged would-be devisees, legatees, and heirs. In the probate court, one of the last American legal bastions of status determination, the challenge posed by tortious interference with expectation of inheritance continues to feel new.

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[145] *Peralta*, 131 P.3d at 84 (citations omitted).

[146] Wilson v. Fritschy, 55 P.3d 997, 1002 (N.M. Ct. App. 2002).

[147] *In re* Estate of Lewis, 770 A.2d 619, 622 (Me. 2001) (quoting Estate of Langley, 586 A.2d 1270, 1271 (Me. 1991)) (second alteration in *In re Estate of Lewis*).

[148] *Breen*, 2005 WL 2736540, at *7 n.7.

[149] *See, e.g.*, J. & S. Servs., Inc. v. Tomter, 139 P.3d 544, 551 (Alaska 2006); Hayes v. A.J. Assocs., Inc., 960 P.2d 556, 571 (Alaska 1998).