TORTIOUS INTERFERENCE WITH INHERITANCE: IS IT A BRAVE NEW WORLD IN CALIFORNIA?

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In the last issue of the *Quarterly*, in part one of this two-part series of articles, the author discussed the recognition for the first time by a California appellate court of the tort of intentional interference with expected inheritance (IIEI). In *Beckwith v. Dahl*,[1] the Court of Appeal for the Fourth District defined the elements of IIEI applicable in California. This part two of the discussion of IIEI focuses on those elements that have been the subject of much debate in other jurisdictions that previously adopted IIEI. Since the Court of Appeal newly recognized IIEI in California, this article examines those cases in order to provide some guidance as to how the California courts might analyze claims of IIEI.

I. SIX ELEMENTS OF INTENTIONAL INTERFERENCE WITH EXPECTED INHERITANCE

To recapitulate, the *Beckwith* Court recognized the tort of IIEI in California for the first time and articulated the following five elements for IIEI: "(1) an expectation of receiving an inheritance; (2) intentional interference with that expectancy by a third party; (3) the interference was independently wrongful or tortious; (4) there was a reasonable certainty that, but for the interference, the plaintiff would have received the inheritance; and (5) damages."[2] In addition, IIEI will not lie if plaintiff has an adequate remedy in probate court.[3]

With respect to the element of interference with a person's expectancy, the *Beckwith* Court emphasized that the plaintiff must plead and prove that the defendant directed the interference *at the testator, not the beneficiary*.[4] "In other words, the defendant's tortious conduct must have induced or caused the testator to take some action that deprives the plaintiff of his expected inheritance."[5] The conduct need not be exclusively aimed at the testator, as long as it is not solely directed at plaintiff.[6] If the defendant made false statements to the testator to induce the testator to change her estate plan, the IIEI plaintiff would not generally have a cause of action for fraud against the defendant: the plaintiff was not defrauded.[7] When the fraud (or other wrongful conduct) is directed at the testator and interferes with plaintiff's expectation of inheritance and there is no remedy in probate court, the tort of IIEI exists to protect the plaintiff.[8]

II. INDEPENDENT WRONGFUL OR TORTIOUS CONDUCT

An element of IIEI requires plaintiff to allege and prove that the defendant's interference was "independently wrongful or tortious." The question arises whether "independently wrongful or tortious conduct" requires that the plaintiff prove that the defendant's conduct satisfies the elements of some independent cause of action. The fact that the wording of the element is in the disjunctive — "wrongful *or* tortious" — suggests that the Court did not intend to require the plaintiff to satisfy all elements of an independent tort to be actionable as IIEI.

IIEI is analogous to the tort of interference with prospective economic advantage (IPEA), another tort requiring proof of "independently wrongful or tortious conduct." California courts confronted with IIEI cases may rely upon cases dealing with this similar tort. Thus, an analysis of California IPEA cases may provide insight into how California courts will analyze IIEI claims.

As discussed below, in California IPEA requires the "wrongful conduct" to be unlawful under statutory, regulatory or common law, or some other determinable legal standard. However, California law remains unclear whether an IPEA plaintiff must prove all elements of an independent cause of action. A case from another jurisdiction suggests that the plaintiff may not need to establish every element of an underlying cause of action to obtain recovery under IIEI.

In *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*,[9] the California Supreme Court held that "a plaintiff seeking to recover for an alleged interference with prospective contractual or economic relations must plead and prove as part of its case-in-chief that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself."[10] In imposing the requirement of "wrongful conduct" as an element of IPEA, the Court distinguished it from the tort of interference with an existing contract in order to avoid use of IPEA as a means of disturbing commerce and free competition: "Economic relationships short of contractual, however, should stand on a different legal footing as far as the potential for tort liability is reckoned. Because ours is a culture firmly wedded to the social rewards of commercial contests, the law usually takes care to draw lines of legal liability in a way that maximizes areas of competition free of legal penalties."[11]

The Supreme Court did not decide in *Della Penna* whether the "wrongful conduct" element required proof of an independent cause of action.[12] In a subsequent decision, the California Supreme Court held that the plaintiff must plead and prove unlawful conduct to sustain a claim under IPEA.[13] Still, it is unclear whether a plaintiff must plead and prove all elements of an independent cause of action based upon the unlawful conduct to recover under IPEA.

There is, of course, a meaningful distinction between the necessity to prevent litigants from wreaking havoc to our system of free competition and questions of interference with an expected inheritance. The dangers to commerce that the IPEA cases seek to avoid at all peril are not present in a typical inheritance dispute. In the author's view, the adoption of the element of "independently wrongful or tortious conduct" as an element of IIEI is intended to recognize that influence over a testator is not actionable unless it is undue or otherwise wrongful. The author believes that this disjunctive wording, to have effect, should also be interpreted to mean that wrongful conduct does not mean that all elements of some independent cause of action is a prerequisite to recovery under IIEI.

Support for these conclusions may be found by looking to Oregon. The California Supreme Court in *Della Penna* reached its conclusion that IPEA requires more than acts of interference in part in reliance on a case from the Oregon Supreme Court.[14] The *Della Penna* Court quoted the Oregon Supreme Court, explaining:

> a claim of interference with economic relations 'is made out when interference resulting in injury to another is *wrongful by some measure beyond the fact of the interference itself.* Defendant's liability may arise from improper motives or from the use of improper means. They may be wrongful by reason of a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession. No question of privilege arises unless the interference would be wrongful but for the privilege; it becomes an issue *only if the acts charged would be tortious on the part of an unprivileged defendant.*'[15]

In view of the California Supreme Court's reliance on the Oregon Supreme Court's analysis of IPEA, the author believes that California courts will find persuasive, *Allen v. Hall*,[16] a case from the Oregon Supreme Court decided twenty years after the decision in *Della Penna*. In that case, the Court addressed whether wrongful conduct for an IIEI claim required proof of an independent tort. The *Allen* court explained that the "independent wrongful conduct" element does not mean that the plaintiff has to prove all the elements of an independent tort. In view of the principles articulated by the Oregon Supreme Court and the past reliance upon Oregon law in California IPEA cases, it appears reasonable to assume that the California courts would conclude, as the Oregon court did, that it is not necessary to prove every element of another tort to recover under IIEI.

In *Allen v. Hall*, George Putman died four years after a heart transplant. After Putman's surgery, he allegedly became increasingly dependent upon Sheryl and Daniel Hall to take care of him physically and financially. On October 9, 1995, Putman executed a will he drafted on his home computer, leaving substantially all of his estate to the Halls. Later in October 1995, Putman drafted a new will on his computer leaving his home to his niece Kristine Sandoz Allen and nephew Eric Sandoz. Putman consulted a lawyer about the new will, who indicated that she would draft an appropriate will to carry out Putman's intent. Allen and Sandoz alleged that Sheryl Hall learned of the new will and took Putman to Good Samaritan Hospital, falsely advising the staff that Putman was becoming increasingly confused and needed hospitalization. Sheryl Hall also allegedly called Putman's lawyer, falsely stating that Putman was not lucid and could not execute any testamentary instruments, but that as soon as he regained lucidity she would contact the lawyer. She never did so. Sheryl Hall also allegedly falsely told hospital staff that she held a power of attorney over medical decisions and instructed the staff to refrain from providing life support when Putman required such measures during his hospital stay. Putman died two days later on November 5, 1995. Allen and Sandoz filed an action for IIEI against the Halls.

The Oregon Supreme Court held that the allegations of the complaint were sufficient to satisfy the element of an independent wrongful act. The Court explained that the "independent wrongful conduct" element does not mean that all elements of an independent tort need be satisfied. The Court stated that misrepresentations may be sufficient to constitute independent wrongful conduct, even if there is no actual reliance on those misrepresentations.[17]

III. AVAILABILITY OF PROBATE REMEDY

As noted above, the Court of Appeal in *Beckwith v. Dahl* adopted the requirement that a plaintiff may not pursue an IIEI claim if the plaintiff has an available remedy in probate. This limitation is intended to balance the need to provide a remedy in appropriate circumstances against the risk of a two-track system for will and trust contests. In *Beckwith v. Dahl*, the plaintiff had no remedy in probate court: the decedent died intestate and the plaintiff had no standing as the decedent's life partner. This fact pattern raises the following question: if a person has standing in probate court, must the person have an available remedy in probate and be unable to pursue a claim for IIEI? Cases in other jurisdictions suggest there may be circumstances where a person with standing in probate court may nonetheless pursue a claim for IIEI.

A. IIEI Claim Available If Plaintiff Can Be Excused from Failure to Timely Contest Will

The 2009 decision by the Illinois Supreme Court in *Estate of Ellis* provides an example of a situation where a plaintiff may bring an IIEI claim even though the statute of limitations applicable to will contests had already run.[18] In *Estate of Ellis*, Grace Ellis executed a will in 1964 devising her estate to Shriners Hospitals for Children ("Shriners") if she died without direct descendants.[19] In 1999, Ellis executed a new will naming her pastor from St. John's Lutheran Church, James Bauman, as the sole beneficiary and executor of the will.[20] Ellis died in 2003 leaving no direct descendants.[21] The will was admitted to probate in 2003 and Bauman was appointed executor.[22]

In 2006, Bauman filed the 1964 will in court in connection with a will contest brought by several of Ellis's heirs.[23] It was only

then that Shriners became aware of the existence of their interest under the 1964 will.[24] In 2006, Shriners filed a "Petition to Contest Will and For Other Relief."[25] Counts I and II contested the validity of the 1999 will on grounds of undue influence and testamentary capacity.[26] Count III alleged IIEI against Bauman.[27] The circuit court granted Bauman's motion to dismiss based upon the passing of the statute of limitations.[28] Shriners appealed only the dismissal of Count III.[29] The appellate court affirmed, indicating that the allegations of Count III for IIEI were identical to the allegations of Count I to invalidate the instrument based upon undue influence.[30]

The Supreme Court agreed with Shriners that the courts below confused IIEI with a will contest, and reversed. The Court's explanation of the distinction between the two is instructive:

> A tort action for intentional interference with inheritance is distinct from a petition to contest the validity of a will, in several important respects. The single issue in a will contest is whether the writing produced is the will of the testator. [Citations.] Any ground which, if proved, would invalidate the will, including undue influence, incapacity, fraud, or revocation, may state a cause of action. [Citations.] The object of a will contest proceeding is not to secure a personal judgment against an individual defendant but is a *quasi in rem* proceeding to set aside a will. [Citations.]
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> By contrast, in a tort claim for intentional interference with inheritance, "[o]ne 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." Restatement (Second) of Torts § 774B (1979). The "widely recognized tort" does not contest the validity of the will; it is a personal action directed at an individual tortfeasor. See *Marshall v. Marshall*, 547 U.S. 293, 312, 126 S.Ct. 1735, 1748, 164 L.Ed.2d 480, 498 (2006) (the tort claim "seeks an *in personam* judgment against [the defendant], not the probate or annulment of a will"). Although some of the evidence may overlap with a will contest proceeding, a plaintiff filing a tort claim must establish the following distinct elements: (1) the existence of an expectancy; (2) defendant's intentional interference with the expectancy; (3) conduct that is tortious in itself, such as fraud, duress, or undue influence; (4) a reasonable certainty that the expectancy would have been realized but for the interference; and (5) damages. [Citations.] The remedy for a tortious interference action is not the setting aside of the will, but a judgment against the individual defendant, and, where the defendant has himself received the benefit of the legacy, a constructive trust, an equitable lien, or "a simple monetary judgment to the extent of the benefits thus tortuously acquired." Restatement (Second) of Torts § 774B(e) (1979).[31]

The Illinois Supreme Court limited the holding of *Estate of Ellis* to its facts, and held that Shriners was not barred by having failed to file timely a will contest because Shriners did not know of the existence of the 1964 will until Bauman filed it in court in 2006.[32]

The Illinois Supreme Court analogized its holding in *Estate of Ellis* to the rule in Florida, articulated by a Florida appellate court in *Schilling v. Herrera*.[33] In *Schilling*, the testator named plaintiff, the testator's sole heir, as the sole beneficiary under a 1996 will.[34] In 2003, defendant persuaded the testator to execute a new will naming defendant as the sole beneficiary.[35] Plaintiff did not learn of decedent's death until after defendant petitioned the probate court for discharge following distribution of the estate assets.[36] Plaintiff filed a complaint against defendant for IIEI, and the trial court dismissed the complaint on the ground that plaintiff failed to exhaust his probate remedies.[37] The appellate court reversed, holding that the plaintiff could pursue his IIEI claim because he did not discover defendant's alleged fraud until after probate.[38]

B. IIEI Available When Defendants Depleted Estate of Assets During Testator's Lifetime

Another issue that will undoubtedly arise as California courts consider IIEI cases is whether an inadequate remedy exists if the interference depleted the estate of assets sufficient to satisfy the plaintiff's expectancy. In New Mexico, a court in the case of *Peralta v. Peralta*[39] held that a plaintiff could pursue a claim for IIEI when lifetime transfers improperly induced by defendants depleted the estate and left plaintiff without a remedy in probate. In *Peralta*, Helen Peralta executed a will in 1979 devising her estate in equal shares to her three children: Nora, Manford and Ruby.[40] At the time, Helen was living with Nora.[41] Along with Delores Valdez, Nora was caring for Helen.[42]

In December 1994, Manford removed Helen from her home and moved her to live with Manford and/or Ruby.[43] In March 1995, Helen's bank accounts were changed to payable on death accounts to benefit Manford and Ruby.[44] At the same time, Helen executed a codicil to her 1979 will to disinherit Nora, and to divide the estate between Manford and Ruby in equal shares.[45] In January 1996, Helen quitclaimed real property with a house and apartments, her only asset other than her bank accounts, to Manford and Ruby, and their spouses.[46] During this time, Manford and Ruby maligned Nora to Helen, telling her that Nora would not take care of Helen and had no use for her.[47] Helen died at the age of 94 in 1999.[48]

Five months after Helen died, Nora filed a complaint for rescission, restitution and recovery and constructive trust over Helen's assets.[49] Nora alleged that Manford and Ruby used their position of control in order to influence Helen to transfer her property to Manford and Ruby, and to disinherit Nora from Helen's will.[50] Manford and Ruby moved for summary judgment, arguing

that Nora had no evidence of undue influence.[51] Nora responded that a presumption of undue influence applied.[52] The trial court granted summary judgment on different grounds: that the "estate" was not before the court because Nora failed to open probate and to name the "estate" in the action.[53]

On appeal, the Court of Appeals framed the issue as whether Nora was required to pursue her claim in probate.[54] The Court noted that New Mexico recognizes a tort of IIEI, but that it does not apply if the plaintiff has an adequate remedy at law.[55] Nora alleged both that the defendants used undue influence to deprive the decedent of her property during life, and that they unduly influenced Helen to disinherit Nora under the testamentary instruments.[56] The Court decided that Nora would not have an adequate remedy in probate in this case because even if she prevailed in an action to invalidate the codicil, there would be no property left in the estate to afford Nora a remedy. As the court explained, "It is this injustice that the tort of intentional interference with inheritance was meant to remedy. We conclude that in a situation where the estate has been depleted so that there would be no remedy in probate, proceeding in a civil action is appropriate."[57]

In Ohio, a claim for IIEI is not ripe until the plaintiff has exhausted her remedies in the probate court.[58] However, when defendant's wrongful conduct depletes the testator's assets prior to death, an action may lie.[59] In *Gay v. Ludwig*, an unreported decision of the Ohio Court of Appeals, the appellate court affirmed a judgment after a court trial of plaintiffs' claims for IIEI and breach of fiduciary duty.[60]

In 1993, Elmer Gehr executed a will that left substantially all of his estate to his nieces and nephews in equal shares. Gehr named one of his nieces, Ludwig, as executor of the will.[61] As Gehr's health declined, he became increasingly dependent for his care on Ludwig.[62] Over the last several years of Gehr's death, Ludwig also assisted Gehr with his finances.[63] During that time frame, Gehr retitled his bank and investment accounts to joint accounts with Ludwig.[64] Afterwards, Ludwig received 450 checks totaling $212,000, 357 of them written by Ludwig and presented to Gehr for his signature.[65]

In that same time period, Ludwig had her own attorney prepare a power of attorney that gave her near plenary authority over decisions concerning Gehr's person and finances.[66] Ludwig took the power of attorney to her personal banker, Linda Merwin, to notarize it, even though both later conceded that Merwin neither witnessed Gehr's signature nor did she know whether it was authentic.[67] In 1999, Ludwig used the power of attorney to admit Gehr into a nursing home.[68] At the same time, she used it to transfer to herself Gehr's stock having a value of approximately $650,000.[69] Merwin again notarized a "statement of intent" purportedly indicating that Gehr intended to transfer the stock when Merwin had no idea whether Gehr's purported signature to the document was authentic.[70] Merwin also guaranteed the stock transfer documents, again without verifying the legitimacy of Gehr's signature.[71] By her actions, Ludwig essentially left the estate without any assets. Gehr died in 2000.[72]

Four of the beneficiaries under the will filed an action for IIEI and breach of fiduciary duty.[73] After a bench trial, the trial court entered judgment in the amount of the value of the stock, with interest, attorneys' fees and punitive damages of $100.[74] The court ordered Ludwig to pay the damages to Gehr's estate (which is inconsistent with the type of *in personam* action that IIEI represents).[75]

Curiously, plaintiffs failed to argue below or on appeal that the transfers to Ludwig were invalid because the power of attorney failed to specify that the attorney in fact had such power under the instrument.[76] The Court of Appeals noted plaintiffs' failure to make this argument, which the Court believed would have been determinative, but concluded nonetheless that the judgment was sound based on the arguments plaintiffs actually made, i.e., that the evidence was sufficient to establish that the transfers were the product of undue influence.[77] The Court noted, for example, that the conduct of Ludwig and Merwin, and the transfer of essentially all of Gehr's assets to Ludwig, while Gehr's will expressed an intent to benefit all of his nieces and nephews equally, tended to support the conclusion that the transfers were not the product of Gehr's true intent.[78]

In the author's view, *Gay* describes the type and quantum of proof that will ultimately suffice to justify a verdict or judgment for damages in California on IIEI. As can be seen, the type of proof in an IIEI case resembles to a great extent the proof that has found success in traditional will and trust contests on the grounds of undue influence, fraud and deceit.

It will be interesting to see whether the California courts will conclude that the remedy in probate is inadequate because the estate is insolvent. In *Gay*, there was no discussion of pursuing remedies to invalidate transfers from the estate in a probate proceeding. In California, for example, an interested person may seek to recover assets that rightfully belong to the estate under Probate Code section 850 et seq., including an award of double damages under section 859. Of course, it is important to note that Probate Code section 850 is nothing more than a procedural statute: it does not create or supplant substantive legal theories of recovery or legal or equitable remedies. With or without a similar procedural statute, such theories and remedies are generally available in all U.S. jurisdictions.

But even with this statutory procedural mechanism we have in California, is it sufficient to create an adequate remedy in probate for these types of cases? An answer may be that section 850 is inadequate in some instances. Circumstances may make it impractical or impossible to obtain relief under section 850, e.g., if the court cannot exercise jurisdiction over all of the persons who claim an interest in the property. Section 850 does not provide a basis for obtaining money damages; it is a claim that seeks to establish ownership by the estate in the property at dispute.

C. Availability of a Trust Contest May Not Preclude Claim for IIEI

Another issue that could be the subject of dispute is whether a trust contest constitutes an adequate remedy in probate. The District Court of Appeal of Florida in *Martin v. Martin* held that a will contest would not provide an adequate remedy to plaintiffs disfavored by a trust, and therefore, plaintiffs would be permitted to pursue a claim for IIEI.[79] In *Martin*, the decedent was survived by two sons from his first marriage and by his second wife.[80] In 1969, the decedent entered into a prenuptial agreement with his second wife, promising to make a will leaving her $50,000.[81] In 1982, the decedent executed a pour-over will and trust that would gift 25% of the trust estate to each of his two sons and a more substantial part of the estate to his wife.[82] The decedent amended his trust in 1982, and executed a new pour-over will and amended trust in 1989.[83] The decedent amended his trust again in 1990 and completely amended and restated the trust in 1991.[84] The 1991 restated trust provided for distribution of 20% to one son, and income on 10% held in trust, to the other son.[85] The decedent died later in 1991.[86]

The sons filed a contest to the 1989 will, but later withdrew the will contest, and instead filed a complaint against the decedent's widow for IIEI.[87] The trial court granted summary judgment in favor of the widow on the grounds that the sons had an adequate remedy in probate.[88] The District Court of Appeal reversed.[89]

The appellate court noted that the 1989 will and 1991 trust were not executed at the same time, therefore, the evidence would not be the same. A contest to the 1989 will would not afford sons the remedy they seek.[90] The Court of Appeal further reasoned that there are "simply too many distinctions, both procedural and substantive, between wills and trusts" to preclude the sons from seeking relief for IIEI on the ground that they had an adequate remedy in probate.[91]

California courts may not reach a similar result because the "probate" in Florida appears to mean "probate." As is the case in California, the probate court in Florida is simply a division of the civil trial courts with general jurisdiction.[92] Will contests and trust contests in Florida may even be consolidated for purposes of discovery and trial.[93] Unlike California, in Florida wills are administered under the probate rules of court, while trusts are administered under rules of civil procedure.[94] In Florida, the laws governing wills are found in the Florida Statutes at Chapters 731-35, while trusts are governed by Florida Statutes, Chapter 737. In California, the Probate Code that contains laws governing decedent's estates, including "probate" of wills and trust laws. California cases also indicate that in certain matters the decisional authority applicable to wills is equally applicable to trusts. Those differences between Florida and California are substantial and may lead to a different result in California than reached in Florida in the *Martin* decision.

While this may be an open issue, this author does not believe the California courts would conclude that a plaintiff lacked an adequate remedy in probate in factual circumstances similar to *Martin*. In this author's view, the California courts would conclude that "an adequate remedy in probate" includes a will or a trust contest. The use of the word "probate" was intended to be in the more general sense as California uses the term, rather than solely to decedent's estates.

CONCLUSION

The Court of Appeal in *Beckwith v. Dahl* narrowly tailored the availability of IIEI in order to provide a remedy where one might not otherwise exist, without providing every litigant with the opportunity to choose between probate and civil tort actions. In California, with no right to a jury trial in most probate proceedings, allowing litigants to choose has even greater significance. The limits imposed by the Court of Appeal may not be as tightly drawn as the Court might have imagined in view of authorities from other jurisdictions with similar limitations on IIEI claims. How the courts will balance the need to provide a remedy without creating a brave new world of civil litigation of inheritance disputes remains to be seen.

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1. (2012) 205 Cal.App.4th 1039. For a detailed discussion of the facts and rulings in *Beckwith v. Dahl*, see Volume 18, Issue No. 2 of the *California Trusts & Estates Quarterly.*
2. *Id.* at p. 1050.
3. *Id.*
4. *Id.* at pp. 1057-58.
5. *Id.* at p. 1058 [citing *Schilling v. Herrera* (Fla.Dist.Ct.App.2007) 952 So.2d 1231 (defendant unduly influenced testator to execute a new will in her favor); *Cardenas v. Schober* (Pa.Super.Ct.2001) 783 A.2d 317, 326 (defendant's intentional failure to adhere to agreement made with testator to draft will in favor of plaintiffs)].
6. *Id.* [citing *Allen v. Leybourne* (Fla.Dist.Ct.App.1966) 190 So.2d 825 (defendant interfered with testator's attempts to change will by falsely telling testator's attorney testator was not lucid)].
7. *Id.*
8. *Id.*
9. (1995) 11 Cal.4th 376.
10. *Id.* at p. 393.
11. *Id.* at p. 392.
12. *Id.* at p. 378.
13. *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159 ("We conclude, therefore, that an act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.").
14. *Della Penna, supra,* 11 Cal.4th at p. 385 (citing *Top Service Body Shop, Inc. v. Allstate Ins. Co.* (Or. 1978) 582 P.2d 1365, 1371).
15. *Id.* (emphasis added).

16. (Or. 1999) 974 P.2d 199. Allen and Sandoz filed their action in federal district court in Oregon based upon diversity jurisdiction. The district court granted the Halls' motion to dismiss on the grounds that Oregon had not adopted a tort for IIEI. On appeal, the Ninth Circuit certified to the Oregon Supreme Court the question of whether such a tort would be valid in Oregon, and the Oregon Supreme Court accepted certification. The Oregon Supreme Court held that it did not need to reach the question of whether Oregon recognizes a separate IIEI cause of action, because the facts alleged were sufficient to establish a claim under a reasonable extension of the tort of intentional interference with prospective economic advantage. That conclusion seems to be a semantic issue more than substantive.

17. *Id.* at p. 205. The court stated: "Under the foregoing standard, the conduct alleged in the present case was improper. The complaint alleges that Sheryl Hall intentionally and falsely represented to Putman's lawyer that Putman was not lucid enough to execute a will. The complaint further alleges that Putman thereafter did not have an opportunity to execute the will prepared by the lawyer. The complaint further alleges that Hall intentionally and falsely represented to the hospital that she had a power of attorney that authorized her to remove Putman from life support. There is no separate allegation that the hospital relied on that false representation, but the complaint does allege that Putman died two days later, "deprived by Sheryl Hall's conduct of the opportunity to execute the will [that his lawyer] had prepared." In sum, plaintiffs have alleged that Sheryl Hall interfered by means of fraudulent misrepresentations, means that are improper" under Oregon law.

18. *Estate of Ellis* (2009) 236 Ill.2d 45 [923 N.E.2d 237], *rehg. den.* (2010). *Estate of Ellis* should be distinguished from the 1983 Illinois Supreme Court in *Robinson v. First State Bank of Monticello* (1983) 97 Ill.2d 174 [454 N.E.2d 288]. In *Robinson,* the Illinois Supreme Court held that the trial court properly dismissed plaintiffs' claim for IIEI because they failed to bring a timely will contest without excuse. In that case, after the court admitted the testator's will to probate, plaintiffs entered into a settlement agreement with the beneficiary under the will. *Robinson, supra,* 454 N.E. at p. 290. Plaintiffs agreed not to contest the will and released the beneficiary from any claims that might arise from any will executed by the testator in exchange for a payment of $125,000 from the estate. *Ibid.* More than six months after the court admitted the will to probate, plaintiffs filed a complaint for IIEI. *Id.* at p. 291. The Supreme Court held that Illinois will not recognize the application of IIEI to circumstances in which plaintiffs engaged an attorney to evaluate a will contest, decided to forego filing a contest, entered into a settlement agreement for $125,000, released the parties from any claims arising from any will and allowed the statutorily prescribed period for contesting a will to pass. *Id.* at p. 293.

19. *Estate of Ellis, supra,* 923 N.E.2d at p. 238.

20. *Id.* at p. 239.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at pp. 240-41.

32. *Id.* at p. 242. An important point is that Shriners met the "an expectation of an inheritance" element of the claim for IIEI. *See Beckwith, supra,* 205 Cal.App.4th at p. 1050. Shriners had no knowledge of the Will, but subjective knowledge by the plaintiff of the decedent's intent is not a prerequisite.

33. *Estate of Ellis, supra,* 923 N.E.2d at p. 242 (citing *Schilling v. Herrera* (Fla.Dist.Ct.App.2007) 952 So.2d 1231, 1236-37).

34. *Id.*

35. *Id.* at p. 243 (citing *Schilling, supra,* 952 So.2d at p. 1233).

36. *Id.*

37. *Id.* (citing *Schilling, supra,* 952 So.2d at p. 1234).

38. *Id.* (citing *Schilling, supra,* 952 So.2d at pp. 1236-37).

39. *Peralta v. Peralta* (N.M.Ct.App.2005) 139 N.M. 231, 233 [131 P.3d 81, 83]. New Mexico first recognized the tort of IIEI in 1994. *Doughty v. Morris* (N.M.Ct.App.1994) 117 N.M. 284, 287 [871 P.2d 380, 383]. A subsequent decision imposed the limitation that the plaintiff not have an adequate remedy in probate. *Wilson v. Fritschy* (N.M.Ct.App.2002) 2002-NMCA-105, ¶ 10,132 [55 P.3d 997].

40. *Peralta, supra,* 131 P.3d at p. 82.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id..*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at p. 83.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Roll v. Edwards* (2004) 156 Ohio App.3d 227, 237 [805 N.E.2d 162, 170]. In that case, the court held that the surviving spouse's will contest, if successful, would provide a complete remedy, and therefore, the IIEI claim was not ripe, because plaintiffs could not allege that they suffered damages as yet. It is unclear how losing the will contest could still entitle the plaintiffs to a tort claim since presumably the court would be determining that the validity of the will excluding the surviving spouse and other family member plaintiffs. The *Roll* court also held that the probate court did not have jurisdiction over a claim for IIEI because the Ohio probate courts have limited jurisdiction and may not entertain cases for money damages (other than surcharge orders against fiduciaries). California probate courts have general jurisdiction, and this alternate holding does not appear viable under California law.

59. *Gay v. Ludwig* (Ohio App. 1 Dist., April 30, 2004, C-030604, C-030607) 2004 WL 911324.

60. *Id.* at p. 2.
61. *Id.* at p. 3.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at pp. 3-4.
78. *Id.*
79. *Martin v. Martin* (Fla.Dist.Ct.App.1997) 687 So.2d 903.
80. *Id.* at p. 904.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* The opinion does not tell us the amount of the gift to decedent's wife by the 1991 trust, but it can be inferred that it was significantly more substantial than the gifts to the sons.
86. *Id.*
87. *Id.*
88. *Id.* (citing *DeWitt v. Duce* (Fla. 1981) 408 So.2d 216).
89. *Id.*
90. *Id.* The Court of Appeal distinguished the sons' actions from another Florida case because in that case, the will and trust were executed the same day, all of the evidence to support a will contest would apply equally to invalidate the trust, and the probate proceeding could give plaintiffs everything in which they had an alleged entitlement. *Id.* (citing *DeWitt v. Duce* (Fla. 1981) 408 So.2d 216).
91. *Id.* at pp. 907-08.
92. *Id.* at p. 907.
93. *Id.*
94. *Id.* at p. 907 n.4.