

## EXPECTATIONS DENIED—SHOULD NEW HAMPSHIRE RECOGNIZE A NEW TORT?

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New Hampshire law provides a framework for challenges to wills and trusts—claims often brought by children of a decedent seeking to challenge a parent's estate planning documents on the ground that the decedent was not competent to sign a will, or on the ground that it was obtained through undue influence or fraud. Such actions are routinely filed in our Probate Division. However, what if an individual expecting an inheritance seeks not to invalidate or set aside a will or trust, but rather seeks to challenge the action taken during a decedent's lifetime that effectively results in the denial of the expected inheritance, a lost inheritance under the will? Does a claim exist to remedy such improper actions of third parties?

A recent appellate division decision in California (*Beckwith v. Dahl*), recently addressed this very issue, putting California in a position to be the 26th state to recognize the tort of "Intentional Interference with Expected Inheritance." In *Beckwith*, Marc MacGinnis had been in a long-term committed relationship with his partner Brett Beckwith. When Mr. MacGinnis became ill, he requested that Mr. Beckwith print a will he had previously drafted, so that he could sign it. This will stated that half of his estate was to pass to Mr. Beckwith, with the other half to Mr. MacGinnis' estranged sister, Ms. Dahl. Before having Mr. MacGinnis sign the will, Mr. Beckwith forwarded a copy to Ms. Dahl, who suggested a trust in lieu of a will. She also requested that Mr. Beckwith hold off on having Mr. MacGinnis sign, so that she could speak with her own attorney. Mr. MacGinnis' condition worsened, with doctors telling him, and Ms. Dahl (but not telling Mr. Beckwith), that he might not survive a needed surgery. Ms. Dahl not only failed to notify Mr. Beckwith of the serious risks associated with the surgery, she also failed to provide her brother with a will or trust document to sign before the operation. Mr. MacGinnis died shortly after the surgery, leaving over \$1,000,000 in an intestate (without will) estate, which, under California law, was to go, in full, to Ms. Dahl.

Mr. Beckwith later filed a claim for Intentional Interference with Expected Inheritance in the California Superior Court, claiming that Ms. Dahl intentionally interfered with his expectation of receiving half of Mr. MacGinnis' estate. The

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Superior Court dismissed the claim on the ground that the tort had not been accepted by the California Supreme Court. On appeal, the Appellate Court reversed, recognizing the validity of such a claim, and noting the claim's elements as: (1) an expectation of receiving an inheritance; (2) intentional interference with that expectancy by a third-party; (3) that was independently wrongful or tortious; (4) where there was reasonable certainty that, but for the interference, the plaintiff would have received the inheritance; and (5) a showing of damages. In accepting this new tort, the Court addressed the argument that such a tort would enable plaintiffs to usurp a testator's true intent and that it is contrary to the principle that gratuitous promises are generally not enforceable. The Court concluded that this claim is akin to other interference tort claims that protect existing business relationships and the expectancy of economic benefits arising from those relationships. The Court cautioned, however, that claims must meet a threshold causation requirement—namely that it is reasonably probable that the lost inheritance would have been realized but for the defendant's interference. Speculative claims are not actionable.

Applied to the facts of the *Beckwith* case, the trial court, on remand, would have to determine whether Ms. Dahl's actions intentionally interfered with Mr. Beckwith's reasonable expectation of inheritance. Mr. Beckwith would have to demonstrate that it was reasonably probable that, had Ms. Dahl not acted in a way that effectively prevented her brother from signing the estate planning documents he intended to sign, he would have in fact received one half of the estate. Based on the reported facts, it seems likely that Mr. Beckwith could have satisfied the elements of this tort.

In New Hampshire, our Supreme Court has yet to recognize a similar tort. Accordingly, had this matter been brought in the Granite State, the trial court presumably would have, as did the California Superior Court initially, denied the claim outright—which begs the question: should New Hampshire adopt such a tort? Absent such a cause of action, there are indeed cases where individuals may lose out on an inheritance as the result of the fraudulent actions of another, and will be left without a remedy. Take the following hypothetical: Mom has a will, leaving her estate (made up of a large savings account) equally to her two daughters. Further assume that the oldest child convinces Mom, suffering from severe Alzheimer's, that she should transfer her bank account into a joint account with the daughter, and this is done just days before her death. As such, upon death, the account transfers to the oldest daughter, leaving nothing in the estate for the younger daughter. Should the youngest be able to assert a claim against the oldest? Absent recognition of such a tort by our Supreme Court, this daughter in New Hampshire may be out of luck—with the unethical older child laughing all the way to the bank.

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