1984

Tortious Interference with Inheritance in Illinois

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INTRODUCTION

Wrongful interference with inheritance occurs when a person's expectations of receiving an inheritance from another are frustrated due to fraudulent interference by a third party. Such interference may be in the nature of procuring or preventing the execution of a will, inducing or preventing the revocation or alteration of a will, suppressing or destroying a will, or obtaining an inter vivos conveyance by unlawful means. The issue of what remedies should be available for such interference has been a problem that has troubled the courts.

Probate and equitable remedies have long been available to one who has been wrongfully deprived of a legacy. A more recent development in the law has been the judicial acceptance of a tort action for intentional interference with inheritance. This cause of


2. See, e.g., Hall v. Hall, 91 Conn. 514, 100 A. 441 (1916) (by falsely representing plaintiff's mental state, defendants procured a will from plaintiff's father which gave property to the defendants which would otherwise have gone to plaintiff); Cyr v. Cote, 396 A.2d 1013 (Me. 1979) (testator was induced to transfer property to the defendants four days before his death); Lewis v. Corbin, 195 Mass. 520, 81 N.E. 248 (1907) (defendant induced testator to draw codicil which defendant knew would be invalid); Creek v. Laski, 248 Mich. 425, 227 N.W. 817 (1929) (defendant destroyed testator's will); Dulin v. Bailey, 172 N.C. 608, 90 S.E. 689 (1916) (defendant removed that part of the will that was beneficial to the plaintiff); Morton v. Petitt, 124 Ohio St. 24, 177 N.E. 591 (1931) (defendants fraudulently suppressed testator's last will and forged and probated a false will).

3. In Gains v. Gains, 9 Ky. (2 A.K. Marsh.) 190 (1920), the court stated: "A devisee, who by fraud or force, prevents the revocation of a will, may, in a court of equity, be considered a trustee for those who would be entitled to the estate, in case it were revoked. . . ." Id. at 191.

See also Pryor v. Coggin, 17 Ga. 444 (1855) (refusal to probate will where revocation was fraudulently prevented); Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889) (will declared void as to defendant beneficiary, who killed testator to prevent revocation of the will); Alter's Appeal, 67 Pa. 341 (1871) (probate refused where testator signed a will which was different from what he intended); Blanchard v. Blanchard, 32 Vt. 62 (1859) (if intention to revoke a will was defeated by fraud, court of equity will interfere to prevent the guilty person from taking advantage of the fraud).

4. An early case refused to allow the tort cause of action on the ground that the plaintiff had no legal right to an inheritance from his father. Hutchins v. Hutchins, 7 Hill 104 (N.Y. Sup. Ct. 1845), discussed infra notes 26-27. A Louisiana court allowed the tort
action has now been recognized in a number of jurisdictions, although many of the courts which allow the action place some restrictions upon its use.

Perhaps because of the relatively recent acceptance of the tort, there are only a few cases and commentaries that discuss the cause of action. In addition to Evans and Comment, supra note 1, see Comment, *Remedy in Tort for Wrongful Interference with Testamentary Intent*, 1 De Paul L. Rev. 253 (1952) [hereinafter cited as *Remedy in Tort*]; Comment, *Tortious Interference with the Expectancy of a Legacy*: Harmon v. Harmon, 32 Me. L. Rev. 529 (1980) [hereinafter cited as *Tortious Interference*]; 45 Mich. L. Rev. 923 (1947); 27 Yale L.J. 263 (1917-1918); Annot., 22 A.L.R. 4th 1229 (1983); Annot., 11 A.L.R. 2d 808 (1950); Annot., 98 A.L.R. 474 (1935).

5. Courts in Georgia, Indiana, Iowa, Louisiana, North Carolina, Ohio, and West Virginia have recognized the tortious interference action. See Mitchell v. Langley, 143 Ga. 827, 85 S.E. 1050 (1915) (action for damages was allowed where defendant fraudulently induced a member of a benefit society to change beneficiaries on a society certificate); Newsom v. Estate of Haythorn, 125 Ind. App. 276, 122 N.E.2d 149 (1954) (allegations that deceased persuaded his mother to revoke an earlier will by which plaintiff received a smaller sum were sufficient to state a cause of action for damages); Frohwein v. Haesemeyer, 264 N.W.2d 792 (Iowa 1978) (cause of action in tort established where the defendant allegedly conspired to defraud plaintiff by wrongfully causing testator to execute a new will); Kelly v. Kelly, 10 La. Ann. 622 (1855) (cause of action was recognized where plaintiff alleged that the defendants prevented decedent, by threats and violence, from executing a will); Bohannon v. Wachovia Bank & Trust Co., 210 N.C. 679, 188 S.E. 390 (1936) (malicious and wrongful interference with the making of a will, as a result of which the testator's grandson did not receive his share of the estate, held actionable); Morton v. Petitt, 124 Ohio St. 241, 177 N.E. 591 (1931) (cause of action in tort was allowed where defendants deliberately destroyed will and forged another will which was probated with the aid of perjured testimony); Barone v. Barone, 294 S.E.2d 260 (W. Va. 1982) (tort action was recognized where defendant wrote testator's will with provisions that were contrary to the testator's wishes).

6. Courts in Colorado, Connecticut, Florida, Illinois, Kansas, Kentucky, Maine, Massachusetts, and Michigan have recognized the cause of action yet have limited the use of the action for tortious interference. See McGregor v. McGregor, 101 F.Supp. 848 (D. Colo. 1951), aff'd, 201 F.2d 528 (10th Cir. 1953) (tort relief is not available for the destruction or suppression of a will unless it is impossible to probate the will or plaintiffs have attempted to probate the will and have failed); Benedict v. Smith, 34 Conn. Supp. 63, 376 A.2d 774 (1977) (plaintiffs could not maintain action against the person allegedly responsible for the loss of a will where they had not alleged that they had unsuccessfully attempted to have the lost will probated); DeWitt v. Duce, 408 So. 2d 216 (Fla. 1981), ans. conformed to, 675 F.2d 670 (5th Cir. 1982) (if adequate relief for wrongful interference with a testamentary expectancy is available in the probate proceedings, that remedy must be exhausted before a tortious interference claim may be pursued); Robinson v. First State Bank of Monticello, 97 Ill. 2d 174, 454 N.E.2d 288 (1983) (tort action is not recognized where plaintiffs have an opportunity to contest a probated will but choose not to do so); Axe v. Wilson, 150 Kan. 794, 96 P.2d 880 (1939) (where a tort action would, if successful, render nugatory the apparent rights of defendant under the will, plaintiff's remedy lay in action to contest will); Allen v. Lovell's Adm'r, 303 Ky. 238, 197 S.W.2d 424 (1946) (tort action for wrongful destruction of a will could not be maintained where the petition disclosed no effort to probate the will and did not allege that the missing will
The tort action was first litigated in Illinois in 1951, but it was not expressly accepted by the courts until thirty years later in *Nemeth v. Banhalmi*. No will was admitted to probate in *Nemeth*, and the court did not discuss the effect of probate proceedings on the availability of the tort action. When the Illinois Supreme Court later decided *Robinson v. First State Bank of Monticello*, however, it refused to recognize the action where the plaintiffs had decided not to contest a will which had been admitted to probate, but then attempted to sue in tort after the statutorily prescribed period for the will contest had expired. *Robinson* highlights the potential conflict between tort and probate remedies in cases involving wrongful interference with testamentary expectancies, and implies the direction to be taken in future cases.

This note will first summarize the development of the cause of action for tortious interference with inheritance and its treatment in other jurisdictions. Because the tort action has arisen only recently in Illinois, it is necessary to look at cases from other jurisdictions in order to trace its development and the restrictions on its use. The note will then review the Illinois precedents relating to both statutory and common law tort relief which led to the *Robinson* decision. Next, *Robinson* will be discussed and analyzed in light of these prior Illinois decisions. The note will conclude with a discussion of the possible conflict between the probate and tort remedies and the implications of *Robinson* for the future.

**BACKGROUND**

Probate and Equitable Remedies

Injured parties deprived of a legacy by the wrongful acts of others have most often sought and found relief in probate and equitable remedies. The probate court often provides complete relief to plaintiffs. This relief may take the form of a refusal by the

could not be probated); Cyr v. Cote, 396 A.2d 1013 (Me. 1979) (court recognized an action for tortious interference under appropriate circumstances, without a discussion of such circumstances, in the case of a fraudulently induced inter vivos transfer); Thayer v. Kitchen, 200 Mass. 382, 86 N.E. 952 (1909) (where the probate act provides a clear, ample, and expeditious remedy, that remedy is exclusive); Creek v. Laski, 248 Mich. 425, 227 N.W. 817 (1929) (tort action allowed where plaintiff attempted, but was unable to prove will in probate proceedings).

10. See Comment, supra note 1, at 85-87. See also Warren, *Fraud, Undue Influence, and Mistake in Wills*, 41 Harv. L. Rev. 309 (1928).
11. See Comment, supra note 1, at 85-86.
court to probate a fraudulently induced will, thereby allowing the estate to pass to the rightful heirs by intestacy.\(^\text{12}\) Even if a will is admitted to probate, the injured party may obtain relief by contesting the will.\(^\text{13}\) Moreover, if a will is fraudulently suppressed or destroyed, the probate court can provide an adequate remedy by probating the lost or destroyed will, if there is sufficient evidence as to its prior existence and content.\(^\text{14}\)

A fundamental proposition of estate law is that only courts with a special jurisdiction over probate and testamentary matters may probate wills.\(^\text{15}\) In addition, a probate decree, like other judgments and decrees, is not subject to collateral attack in other courts.\(^\text{16}\) Therefore, another court cannot determine the validity of a will when there is an outstanding probate order.\(^\text{17}\)

If one has been deprived of an inheritance, and probate remedies have proved inadequate, equitable remedies may be available. Such relief is usually granted where there has been fraud on the

\(^\text{12. See, e.g., Brignati v. Medenwald, 315 Mass. 636, 53 N.E.2d 673 (1944). The defendant in Brignati cared for the testator before his death and fraudulently induced him to make a will favorable to the defendant and unfavorable to the plaintiff, testator's only child. The court held that if the probate court refused to admit the will, complete justice would be done because the property would pass to the plaintiff by intestacy.}

\(^\text{13. See, e.g., Axe v. Wilson, 150 Kan. 794, 96 P.2d 880 (1939) (tort action not allowed where a will contest action was pending, since both actions involved the same property and the will contest would provide complete relief).}

\(^\text{14. See, e.g., Thayer v. Kitchen, 200 Mass. 382, 383, 86 N.E. 952, 953 (1909). The court refused to allow a tort action where the lost or destroyed will could be proved in the probate court, stating: "Under these circumstances the [probate] statute has provided a clear, ample and expeditious remedy. By numerous decisions of this court, when the Legislature provides such a remedy, it has been held to be exclusive. Other relief will be refused where plain and adequate statutory redress is available."}

\(^\text{15. 79 AM. JUR. 2D § 850 (1978). In most states, statutes confer jurisdiction over probate matters to separate probate courts or vest special jurisdiction over such matters in courts also having jurisdiction over other subjects. Id.}

\(^\text{16. See Hall v. Hall, 91 Conn. 514, 516, 100 A. 441, 443 (1917).}

\(^\text{17. Hall, 91 Conn. at 516, 100 A. at 443.}

A collateral attack may occur, for example, where there is a new proceeding to relitigate the validity of the will after probate, a proceeding to probate another will which is inconsistent with the one already admitted to probate, a suit for partition, or a suit to remove a cloud from the title. 3 BOWE & PARKER, PAGE ON THE LAW OF WILLS § 26.114 (1961). See also Evans, supra note 1, at 202-05; Comment, supra note 1, at 86-89.
court, that is, where one party deceives the court and prevents the contestant from having a fair hearing.\textsuperscript{18} Equitable relief usually takes the form of a constructive trust in property received from the estate by the party guilty of the unlawful interference.\textsuperscript{19}

\textbf{The Development of the Tort Cause of Action}

Although probate and equitable remedies provided relief in many cases of interference with an expectancy, in some cases they were unsatisfactory.\textsuperscript{20} Eventually, the tort action for intentional

\textsuperscript{18} Fraud on the court is also known as extrinsic fraud. Such fraud is defined in United States v. Throckmorton, 98 U.S. 61 (1878):

Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side;—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing . . . In all these cases . . . relief has been granted on the ground that by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court.

\textit{Id.} at 65.

This type of fraud is distinguished from intrinsic fraud, or fraud in the original transaction. In the case of fraud in obtaining the execution of the will, or undue influence, the contestant has an opportunity to submit the issue to the probate court. There is no reason why a party who is defeated in such a judicial determination of the question of fraud in the execution of a will should have a rehearing of his case in equity. 3 \textsc{Bowe} & \textsc{Parker}, \textit{supra} note 16, at § 26.20.

\textsuperscript{19} See \textit{Lowe}, 342 Ill. App. at 385, 96 N.E.2d at 834. The rule as to equitable relief was stated in \textit{Ransdel v. Moore}, 153 Ind. 393, 399, 53 N.E. 767, 771 (1899):

\textit{[W]hen an heir or devisee in a will prevents the testator from providing for one for whom he would have provided but for the interference of the heir or devisee, such heir or devisee will be deemed a trustee, by operation of law, of the property, real or personal, received by him from the testator's estate, to the amount or extent that the defrauded party would have received had not the intention of the deceased been interfered with.}

\textsuperscript{20} See, e.g., \textit{Lewis v. Corbin}, 195 Mass. 520, 81 N.E. 248 (1907) (defendant induced testator to execute a codicil to her will in the presence of only one witness, knowing that the codicil was rendered invalid in probate); \textit{Bohanon v. Wachovia Bank & Trust Co.}, 210 N.C. 679, 188 S.E. 390 (1936) (testator was wrongfully prevented from making a will; therefore, there was nothing for the probate court to act upon); \textit{Dulin v. Bailey}, 172 N.C. 608, 90 S.E. 689 (1916) (defendant fraudulently removed provisions of a will beneficial to the plaintiff, and the evidence accessible to the plaintiff would not prove the entire contents of the will in the probate court); \textit{Morton v. Petitt}, 124 Ohio St. 241, 177 N.E. 591 (1931) (plaintiff did not discover the fraudulent suppression of testator's will until twenty years after testator's death, long after the statutory period for a will contest had ended). \textit{See also} Evans, \textit{supra} note 1, at 204-05; Comment, \textit{supra} note 1, at 85-86.
interference with inheritance developed as an alternative remedy. Well over a hundred years ago, an American court held that a tort action would lie for interference with a testamentary expectancy.\textsuperscript{21} Notwithstanding that decision, plaintiffs in United States courts seldom attempted the tort remedy until the beginning of the twentieth century.\textsuperscript{22} Gradually, however, as the range of tort liability for interference with expectancies in other contexts expanded,\textsuperscript{23} courts began to recognize a cause of action for tortious interference with testamentary expectancies as well.\textsuperscript{24}

The Early Cases

American courts first dealt with the tort remedy in 1845, in \textit{Hutchins v. Hutchins}.\textsuperscript{25} In \textit{Hutchins}, the plaintiff brought suit against the defendant for maliciously inducing the testator to revoke a will which would have given the plaintiff certain property and to draft a new will giving plaintiff nothing. The court refused to allow the action for damages, reasoning that the plaintiff's interest in the bequest was too uncertain.\textsuperscript{26} Of importance to the court

\textsuperscript{21} Kelly v. Kelly, 10 La. Ann. 622 (1855) (plaintiff's claim that defendants, by threats and violence, prevented decedent from naming plaintiff in the will stated cause of action).

\textsuperscript{22} Comment, \textit{supra} note 1, at 79-80.

\textsuperscript{23} The tort action for intentional interference with inheritance developed out of cases that recognized a cause of action for tortious interference with commercial expectancies. Tortious interference with a commercial expectancy was first recognized in the British case of \textit{Lumley v. Gye}, 118 Eng. Rep. 749 (Q.B. 1853). In \textit{Lumley}, the defendant convinced a singer to break her exclusive contract with the plaintiff theater owner. The court held that a tort action would lie against one who wrongfully or maliciously induced a person under contract with the plaintiff to break the contract.


\textsuperscript{24} See, \textit{e.g.}, Hall v. Hall, 91 Conn. 514, 100 A. 441 (1917); Lewis v. Corbin, 195 Mass. 520, 81 N.E. 248 (1907); Creek v. Laski, 248 Mich. 425, 227 N.W. 817 (1929); Dulin v. Bailey, 172 N.C. 608, 90 S.E. 689 (1916).

\textsuperscript{25} 7 Hill 104 (N.Y. Sup. Ct. 1845).

\textsuperscript{26} \textit{Id.} at 109-10. In his first will the testator devised a farm to the plaintiff, his son. He revoked that will after the defendants falsely represented to him that the plaintiff was embezzling his money and mortgaging his land. The testator then executed a second will which omitted the devise to the plaintiff. After the second will was admitted to probate, the plaintiff brought an action for damages. In denying the cause of action, the court stated:

\textit{In respect to the farm devised to him by the first will, [the plaintiff] fails to show...}
was the possibility that the plaintiff's expectancy might not have materialized, since the testator might have changed his mind or lost the property before his death. 27

A decade later, in *Kelly v. Kelly*, 28 a Louisiana court allowed a tort action to be brought. In *Kelly*, the court held that the action would lie against one who, by force and violence, prevented a person from executing a will in favor of the plaintiff. 29 Although a tort theory was allowed in *Kelly*, actions for tortious interference with inheritance virtually disappeared from the dockets of American courts until after the turn of the century. 30

Utilization of a tort theory for interference with inheritance witnessed a revival as courts began to protect testamentary expectancies. 31 In a number of cases where the tort action was allowed, the testator had actually taken steps toward perfecting the gift or bequest, 32 or the defendant's fraud in preventing the expectancy from materializing continued until the testator's death. 33 Under those

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27. Id. at 109.
28. Id. at 110.
29. Id. at 622 (1855). In *Kelly*, the plaintiff alleged that the defendants, the decedent's mother and brother, prevented her husband from executing a will in her favor. The court held that the plaintiff alleged a sufficient ground of action but that she failed to prove her case. The record showed only that the persons called to witness the decedent's will left the house after perceiving dissatisfaction in the family. The court found that the witnesses left of their own free will and not because of threats or violence.
30. Id. at 622.
31. See Comment, *supra* note 1, at 79 n.7.
32. See, e.g., *Allen v. Leybourne*, 190 So. 2d 825 (Fla. Dist. Ct. App. 1966) (testator's fixed intention to make bequest in favor of plaintiff was noted in a written agreement); *Mitchell v. Langley*, 143 Ga. 827, 85 S.E. 1050 (1915) (member of benefit society had taken out a certificate payable at his death to his three half-sisters).
33. See, e.g., *Hegarty v. Hegarty*, 52 F. Supp. 296 (D. Mass. 1943) (judge instructed the jury that it could not find in favor of the plaintiff unless it found that the interference was continuously operating and effective at the time the gift otherwise would have taken place); *Lewis v. Corbin*, 195 Mass. 520, 81 N.E. 248 (1907) (court sustained defendant's demurrer on ground that pleading did not aver facts which excluded the possibility that the testatrix changed her intention in regard to the legacy and which showed that fraud continued to operate until her death). *Cf. Castenovia v. Castenovia*, 82 N.J. Super. 251, 197 A.2d 406 (1964), where the court held that no tort action for interference with an expected gift or legacy will lie if the donor is alive and competent. The court stated:

It seems to us that the *ratio decidendi* of the decisional law giving recognition to causes of action for the protection of an expectant donative interest is 'strong
circumstances, the plaintiff’s interest in the decedent’s property was no longer considered too uncertain to warrant protection, and the wrongful interference became actionable.\textsuperscript{34}

\textbf{Current Status of the Tort Remedy}

A number of states now recognize a cause of action for intentional interference with inheritance.\textsuperscript{35} The courts allowing the action have not discussed the customary tort elements of duty, breach, causation and injury.\textsuperscript{36} Instead, they have noted one or more of the following elements which the plaintiff would have to prove in order to recover: the existence of the expectancy; the reasonable certainty that the plaintiff would have received the expectancy but for defendant’s interference; the intention of the defendant to interfere with the expectancy; tortious conduct, such as fraud, duress, or undue influence, involved in the interference; and damages.\textsuperscript{37}

Although courts have recognized the tort action, there is a split probability\textsuperscript{34} that the anticipated gift or legacy would have been received but for wrongful interference, which necessarily subsumes the death or mental incompetency of the donor at the time the action is instituted.

82 N.J. Super. at 256, 197 A.2d at 409.

\textit{See also} Harmon v. Harmon, 404 A.2d 1020 (Me. 1979), discussed in \textit{Tortious Interference, supra} note 4. In \textit{Harmon}, the court held that prior to his mother’s death the plaintiff could maintain an action in tort against the defendants for wrongful interference with his intended legacy. The plaintiff’s mother was eighty-seven years old and in ill health when the defendants induced her to transfer valuable property to them, thereby effectively disinheriting the plaintiff.

34. \textit{See} Comment, \textit{supra} note 1, at 81-82.

35. \textit{See supra} note 5.


37. \textit{See}, e.g., Davison v. Feuerherd, 391 So. 2d 799 (Fla. Dist. Ct. App. 1980) (plaintiff must prove to a reasonable certainty that she would have received the expectancy but for defendant’s malicious interference); Allen v. Leybourne, 190 So. 2d 825 (Fla. Dist. Ct. App. 1966) (the elements that were established included a fixed intention to make a bequest on the part of the testator, strong probability that the anticipated gift or legacy would have been received but for wrongful interference, and wrongful interference); Nemeth v. Banalmi, 99 Ill. App. 3d 493, 425 N.E.2d 1187 (1981) (the court noted that the following elements were required: existence of expectancy, reasonable certainty that plaintiff would have received the expectancy but for defendant’s interference, intention of defendant to interfere with the expectancy, tortious conduct, and damages); Hegarty v. Hegarty, 52 F. Supp. 296 (D. Mass. 1943) (plaintiff must prove an intention to make bequest and intentional interference by the defendant); Lewis v. Corbin, 195 Mass. 520, 81 N.E. 248 (1907) (to create a liability there must be not only a wrong inflicted by defendant, but also damages to the plaintiff resulting directly therefrom, and plaintiff must show facts excluding the possibility that testator, before his death, changed his purpose respecting the legacy).

After noting that the tortious interference action may be difficult to prove, one court remarked, “There is an old maxim of the law, ‘No wrong without a remedy.’ The plaintiff . . . has a right to ‘fish’ in defendant’s pond—whether he catches anything is yet to be
of authority as to when such an action will be allowed. In the majority of jurisdictions, the tort action will be allowed only if no adequate remedy is available in the probate proceedings; if an adequate probate remedy exists, the tort action will be considered a collateral attack on the probate decree and will not be allowed. In contrast, the minority view allows the plaintiff to pursue the tort remedy even though a will contest determining the issues would be possible during probate.

Under the majority view, the issue in both the probate and tort proceedings is normally viewed as a determination of the validity of the will. By statute, that question is decided by the probate court, and cannot be subsequently retried in a collateral proceed-

38. See supra note 6 and infra note 40.
39. See supra notes 6, 16.
40. Courts in only three jurisdictions, Iowa, North Carolina, and West Virginia, have assumed that the tort action is not a collateral attack on the probate decree. In Frohwein v. Haesemeyer, 264 N.W.2d 792 (Iowa 1978), the plaintiff, who was a beneficiary under an earlier will, brought an action for damages against the executor and the sole beneficiary under testator's subsequent probated will. The petition alleged that the defendants had conspired to defraud the plaintiff by tortiously causing the testator to execute the subsequent will. The court did not view the law action instituted by the plaintiff as a collateral attack on the probate order even though the allegations of plaintiff's petition in the law action could have been presented in a will contest. Id. at 795.

In Dulin v. Bailey, 172 N.C. 608, 90 S.E. 689 (1916), the defendants allegedly conspired to deprive the plaintiff of a bequest in testator's will by removing provisions from the will. The court stated that the plaintiff was not seeking to attack the will on record or to recover anything out of the estate, but was bringing a tort action against the defendants. Id. at 609, 90 S.E. at 689. It should be noted that in Dulin, the court may have found that the tort action was not a collateral attack on the probate decree because the plaintiff did not have an adequate probate remedy. If the plaintiff could not prove the contents of the will provisions which the defendants allegedly destroyed, her only remedy would have been against the defendants individually for their tort.

The facts in Dulin are similar to those in Creek v. Laski, 248 Mich. 425, 227 N.W. 817 (1929), where the plaintiff was unable to prove a destroyed will in the probate proceedings. The court in Creek also permitted the plaintiff to bring a tort action against the defendants.

In Barone v. Barone, 294 S.E.2d 260 (W. Va. 1982), the plaintiff brought a tortious interference action against the defendant for writing a will contrary to the testator's wishes. The court held that the tort action was not within the probate jurisdiction, because the plaintiff was not trying to impeach or establish a will, but was complaining about a tortious injury. Id. at 263, 264.

42. In Illinois, the question is governed by the Probate Act of 1975, ILL. REV. STAT. ch. 110½, § 4-4 (1983), which provides: "If the proponent establishes the will by sufficient competent evidence, it shall be admitted to probate, unless there is proof of fraud, forgery, compulsion or other improper conduct which in the opinion of the court is deemed sufficient to invalidate or destroy the will."
This rule is consistent with the equitable principle that relief from the probate decree will be granted only where there has been a fraud on the court, and not where there has been a fraud in the execution of the instrument.

Thus, when the plaintiffs have had a reasonable opportunity during the probate proceedings to be heard and to present evidence regarding the wrongful interference, and the issue of the validity of the will has been fully considered and decided, courts have not allowed an attack on the probate decree in a later tort or equity action. For example, courts have refused to recognize an action in tort when plaintiffs made no effort to probate a destroyed will, or did not attempt to probate a prior favorable will where two wills existed. It has been argued that this type of reasoning is consistent with the purpose of legislatures in passing probate acts, which was to ensure that all claims relating to the administration of estates be handled in the probate proceedings, thereby providing a single forum for settling the rights of the parties.

A later action for tortious interference will be permitted under the majority view if adequate relief is not available in the probate court. Accordingly, a plaintiff has been allowed to bring a tort claim when the defendant's fraud has not been discovered until af-

43. See Evans, supra note 1, at 188. See supra notes 16-17.
44. See supra note 1. See also Evans, supra note 1, at 200-02.
45. See Evans, supra note 1, at 200-02; Comment, supra note 1, at 87-88.

Although the plaintiff's right to be heard is important in determining whether the tortious interference action will be considered a collateral attack on the probate decree, the issue is rarely discussed in due process terms. In DeWitt v. Duce, 408 So. 2d 216 (Fla. 1981), ans. conformed to, 675 F.2d 670 (5th Cir. 1982), the plaintiffs asserted that refusal of their tort action was a violation of their due process rights. The court found that there was no due process problem, because the entire basis for disallowing the tort action was the existence of adequate relief in probate. The decision also noted that the state's interest in an orderly succession of property can outweigh a party's equal protection or due process interests. 408 So. 2d at 220-21.

In Axe v. Wilson, 150 Kan. 794, 96 P.2d 880 (1940), the court stated that denying the plaintiff a tort remedy where it would have the same effect as a will contest did not deny plaintiff a legal right but simply determined her remedy. 150 Kan. at 803, 96 P.2d at 887.

46. See, e.g., Allen v. Lovell's Adm'x, 303 Ky. 238, 197 S.W.2d 424 (1946).
48. As one author has observed:

The purpose of [a probate] statute is obviously to induce the speedy and permanent disposition of the property of deceased persons, and to prevent prolonged litigation over estates and the resultant uncertainty of titles which would ensue. There is doubtless a great public interest in such quick and definitive settlement in a single court.

G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 477, at 143 (rev. 2d ed. 1978). See also Comment, supra note 1, at 87 n.74.
49. See, e.g., Creek v. Laski, 248 Mich. 425, 227 N.W. 817 (1929) (because the plain-
ter the time for contesting a will has expired. Also, the action has been permitted where the defendant's fraudulent conduct has caused the testator to make an inter vivos conveyance of assets that the plaintiff would otherwise have received from the estate. In these cases, because there is no adequate probate remedy, the plaintiff is permitted to seek relief in tort under the theory that no wrong should be without a remedy.

Courts which follow the minority position do not consider the tort action to be a collateral attack on the probate proceedings. This is based upon the view that the probate and tort causes of action are not the same. Under this view, the tort action involves the defendant's personal liability based on his fraudulent conduct and does not involve the estate or an attack on the will. For example, a tort action was permitted against a defendant who removed from the will the testator's signature and a clause giving the plaintiff a legacy, even though a previous will of the testator had

tiff was unable to establish in the probate proceeding the existence of a destroyed will, the tort action was allowed).

50. See, e.g., Morton v. Pettit, 124 Ohio St. 241, 177 N.E. 591 (1931) (plaintiff did not discover fraud until twenty years after the will had been admitted to probate). Equity also generally allows relief in this situation. See, e.g., Gaines v. Chew, 43 U.S. (2 How.) 619 (1844) (after suppression of later will and fraudulent probate of previously revoked will, the defendant could be required to answer questions regarding the alleged spoilation of the later will). See also Seeds v. Seeds, 116 Ohio St. 144, 156 N.E. 193 (1927) (husband forged wife's will, had it probated using perjured testimony, and prevented heirs from receiving notice of and contesting probate).


52. In Creek v. Laski, 248 Mich. 425, 227 N.W. 817 (1929), the plaintiff was unable to establish a destroyed will in a probate proceeding. The court allowed a tort action and stated that "whenever the law gives a right or prohibits an injury, it will also afford a remedy." Id. at 428, 227 N.W. at 819. See also Mitchell v. Langley, 143 Ga. 827, 85 S.E. 1050 (1915) (tort action allowed where defendants induced decedent to change beneficiaries on a benefit society certificate); Allen v. Lovell's Adm'x, 303 Ky. 238, 197 S.W.2d 424 (1946) (if destroyed will can be probated, it should be, but if not, a tort action may be maintained).

53. See supra note 40.

54. Under the minority view, the courts accept the action for damages as an independent action which is not affected by the probate decree. See, e.g., Frohwein v. Haesemeyer, 264 N.W.2d 792 (Iowa 1978); Dulin v. Bailey, 172 N.C. 608, 90 S.E. 689 (1916); Barone v. Barone, 294 S.E.2d 260 (W. Va. 1982).

55. See Frohwein v. Haesemeyer, 264 N.W.2d 792, 795 (Iowa 1978) (plaintiff's action based on tortious interference with a bequest in his favor did not involve the estate); Dulin v. Bailey, 172 N.C. 608, 90 S.E. 689 (1916) (plaintiff was not seeking to attack the will, probate a subsequent will, or recover from the estate, but was bringing an independent action in tort against the defendants); Barone v. Barone, 294 S.E.2d 260, 262 (W. Va. 1982) (plaintiff was not trying to impeach or establish a will, but rather was complaining about a tortious injury). See also Remedy in Tort, supra note 4, at 255.
been admitted to probate.\textsuperscript{56} A tort action has also been allowed where the plaintiff alleged that the defendants unduly influenced the testator in the making of the will.\textsuperscript{57} In accordance with the minority view, these courts did not require the plaintiffs to exhaust their probate remedies before bringing an action in tort.\textsuperscript{58}

\textit{Will Contests in Illinois}

In Illinois, a number of decisions have dealt with the probate remedy of will contests and collateral attacks on the probate decree.\textsuperscript{59} Generally, Illinois courts have upheld the importance of the exclusivity of a will contest to determine the validity of a will.\textsuperscript{60} In addition, Illinois decisions have emphasized the strict time limitations that should be imposed upon the bringing of such contests.\textsuperscript{61}

In \textit{Dibble v. Winter},\textsuperscript{62} the court stated that where the only possible remedy in a proceeding was to set aside a will and render it null and void, it was, in effect, a will contest, and must be governed by the appropriate statutory provisions.\textsuperscript{63} The rule was restated in \textit{In
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re Estate of Moerschel,64 where the court added that such a result was consistent with Illinois' long standing policy favoring the orderly administration of estates.65

It is also a well-established rule in Illinois that the validity of a will cannot be collaterally attacked after the statutorily prescribed time period for a will contest has run.66 Under the Illinois Probate Act,67 the effect of the order admitting a will to probate is to transfer the real and personal estate of the testator bequeathed in the will68 and to establish the validity of the will against collateral attack.69 However, the probate order is not final as to a will's execution or validity. During the six-month period following the admission of the will to probate, any interested person may file a petition directly challenging the validity of the will.70 This gives a contestant to the will an opportunity to question the circumstances relating to the execution of the will, the capacity of the testator, and other relevant facts before the validity of the will is finally established.71 If a will is admitted to probate, and despite the opportunity to contest the will in a direct proceeding no will contest is

64. 86 Ill. App. 3d 482, 407 N.E.2d 1131 (1980). The plaintiff in Moerschel filed a petition for a declaratory judgment that the testator's will was void. The petition was dismissed on the grounds that the action was in the nature of a will contest and was not brought within six months after the admission of the will to probate as required by statute. See also Blyman v. Shelby Loan & Trust Co., 382 Ill. 415, 47 N.E.2d 706 (1943) (validity of a will cannot be raised as a basis for or defense to a partition suit); Masin v. Bassford, 381 Ill. 569, 46 N.E.2d 366 (1943) (validity of will must be contested within statutory period); In re Estate of Breault, 113 Ill. App. 2d 356, 251 N.E.2d 910 (1969) (action to contest will must be exercised according to statutory provisions); In re Estate of Watts, 67 Ill. App. 3d 463, 384 N.E.2d 589 (1979) (court lacked jurisdiction to determine validity of will where no appeal was taken from the order admitting will to probate and no will contest was brought within the statutory period).

65. Moerschel, 86 Ill. App. 3d at 486, 407 N.E.2d at 1134.
66. Id. at 485, 407 N.E.2d at 1133.
68. Id. at ¶ 4-13.
70. Probate Act of 1975, ILL. REV. STAT. ch. 110 1/2, ¶ 8-1 (1983). The Act defines an interested person as "one who has or represents a financial interest, property right or fiduciary status at the time of reference which may be affected by the action, power or proceeding involved, including without limitation an heir, legatee, creditor, person entitled to a spouse's or child's award and the representative." Id. at ¶ 1-2.11.
71. Sternberg v. St. Louis Union Trust Co., 394 Ill. 452, 460, 68 N.E.2d 892, 896 (1946). The court stated that the will contest proceeding determines the validity of the will only and cannot be used to attack the order admitting the will to probate or the effect of probate. Id. See also Davis v. Upson, 209 Ill. 206, 70 N.E. 602 (1904) (order admitting will to probate could not be attacked in suit to contest a foreign will).
brought within the statutory period, the validity of the will is deemed established for all purposes.72

The history of will contest proceedings and the policy considerations supporting the statutory time period during which such actions could be brought were treated at length in Luther v. Luther.73 In Luther, the court found that the provision limiting the time for the filing of a will contest was not a mere statute of limitations, but was a jurisdictional limitation.74 Since the right to contest the validity of the will was conferred only by statute, and was not previously available in a court of chancery, the court had jurisdiction only under the limitations imposed by the statute.75 The court emphasized the necessity of imposing the time limitation in order to ensure an orderly settlement of the estate and to protect both creditors and the parties taking under the will.76 Further, the court recognized that the original probate decree should be considered binding after a specified time because a long delay resulting from a will contest could prejudice the rights of the parties involved.77

After Luther, the Illinois courts continued to emphasize the importance of the exclusivity of the will contest and its underlying policy by continuing to adhere to the available statutory time period.78 In addition to finding the time limit jurisdictional, the courts also held that it is not tolled by fraudulent concealment or by any other occurrence not expressly provided for by statute.79

72. Sternberg, 394 Ill. at 460, 68 N.E.2d at 896.
73. 122 Ill. 558, 13 N.E. 166 (1887). In Luther, a will was admitted to probate in 1875, yet the suit contesting its validity was not brought until ten years later. At that time, the statutory period for the filing of will contests was three years, but the plaintiffs did not learn of the testator's unsoundness of mind nor of the fraud and undue influence used in obtaining his will until eight years after his death. Notwithstanding these facts, the court dismissed the case because the statutory time limitation was not met.
74. Id. at 566, 13 N.E. at 169. The plaintiffs in Luther claimed that the Probate Act provisions for filing the will contest petition within three years was a statute of limitations and that the defendants waived the bar of the statute because they did not plead it in their answer. Their position was based on the theory that the right to contest the validity of the will was a right which existed at common law before the statute and not a new right conferred by the Probate Act. They claimed, therefore, that the statute merely limited the time for asserting that right. The court, however, found that the jurisdiction of the courts to hear cases to set aside the probate of wills was derived exclusively from the statute. Id. at 565-66, 13 N.E. at 168-69.
75. Id. at 566, 13 N.E. at 169.
76. Id.
77. Id. A later case added: "So important has this been deemed by courts and legislatures that neither fraud and concealment, nor the admitted incompetency of an attesting witness nor even the insanity of an heir can upset an order of probate after the time allowed." Pedersen v. Dempsey, 341 Ill. App. 141, 143, 93 N.E.2d 85, 86 (1950).
78. See supra note 61 and accompanying text.
79. See Ruffing v. Glissendorf, 41 Ill. 2d 412, 419, 243 N.E.2d 236, 240 (1969). The
Given Illinois' strong emphasis on the importance of the settlement of estates through the statutory provisions of the Probate Act, relief in tort for intentional interference with inheritance has seldom been sought in Illinois.80

**DISCUSSION**

*Tortious Interference with Inheritance in Illinois Prior to Robinson v. First State Bank of Monticello*

In Illinois, past decisions appear to follow the courts holding the majority view regarding the availability of the tort action.81 Like those courts, the Illinois courts normally do not permit such actions because they view both probate and tort proceedings as determining the same issue, which is the validity of the will.82 This view is evident in the Illinois cases dealing with the probate remedy of will contests.83

The Illinois Appellate Court first dealt with the tortious interference action in 1951 in *Lowe Foundation v. Northern Trust Co.*84 In *Lowe*, the plaintiff, a nonheir, brought suit against the executor of decedent's estate for wrongful interference with and prevention of the execution of a codicil to decedent's will.85 This provision, if operative, would have bequeathed $500,000 to the plaintiff.86 The decedent had signed a holographic will naming the plaintiff as beneficiary of the $500,000 bequest, and later a codicil without the amount filled in was signed by the decedent in the presence of witnesses.87 When the omission was brought to the decedent's attention, the defendant, an attorney who had drawn an earlier will and codicil for the decedent, stated that the $500,000 bequest would exhaust his entire estate and that the codicil should not be com-

petitioners in *Ruffing* sought to invalidate a will on the ground of alleged lack of mental capacity of the decedent. The suit was filed under old section 72 of the Civil Practice Act, Ill. Rev. Stat. ch. 110, § 72 (1965) over one year after the order admitting the will to probate, at a time when the statutory period for bringing will contests was nine months. The court rejected the petitioners' argument that because the probate court had been abolished as a separate judicial entity since the *Luther* decision, the limitation period of the Probate Act was no longer a jurisdictional limitation but was a statute of limitations which could be tolled by fraud.

80. See infra notes 84, 95 and accompanying text.
81. See supra notes 41-52 and accompanying text.
82. See supra notes 66-69 and accompanying text.
83. See supra notes 60, 62-65.
85. Lowe, 342 Ill. App. at 381, 96 N.E.2d at 832.
86. Id. at 381-82, 96 N.E.2d at 832.
87. Id. at 382, 96 N.E.2d at 832.
pleted until he had talked with another adviser. The codicil was then destroyed and a new codicil was signed which did not include the bequest to the plaintiff. Less than a week later, the decedent died.

After the probate court denied probate of the alleged holographic will, the plaintiff appealed. On appeal, the plaintiff sought to claim $500,000 in damages for the wrongful interference with decedent's testamentary disposition. The court held that the complaint did not state a cause of action that would warrant an award of damages in tort. The court did, however, imply that such a cause of action would lie in Illinois if actionable fraud were alleged. However, the court found nothing in the complaint to overcome the presumption that the defendant had acted honestly; therefore, the facts in Lowe were not sufficient as a basis for recovery. Despite the Lowe court's implication of the availability of an alternative remedy for wrongful interference with an expectancy, the tort action did not reappear in the Illinois courts until 1981, in Nemeth v. Banhalmi.

In Nemeth, the plaintiff sought damages from her stepsister and her stepsister's husband for their wrongful interference with an expectancy from her stepfather. The plaintiff alleged that she was a legatee under two prior wills executed by her stepfather as a result

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88. Id.
89. Id.
90. Id. at 381, 96 N.E.2d at 832. The plaintiff first appealed to the circuit court, but procured dismissal of that appeal before hearing. Id. at 383, 96 N.E.2d at 833.
91. Id. at 381, 96 N.E.2d at 832. The plaintiff also requested the court to set aside the new codicil and its probate and to establish a constructive trust in favor of the plaintiff. Id. at 384, 96 N.E.2d at 833. The Appellate Court found that because the plaintiff procured the dismissal of its appeal to the circuit court, the order of the probate court was still in full force. Since the codicil which would have given the plaintiff an interest in the estate and made it an interested party had not been probated, the plaintiff was not entitled to contest the probate of the later codicil. Id. at 385, 96 N.E. 2d at 834. The court also declined to declare a constructive trust because such relief had never been granted where the intended testamentary disposition of property had been prevented by the fraud of a third person. Id. at 386, 96 N.E.2d at 834.
92. Id. at 389, 96 N.E.2d at 835.
93. Id. at 388, 96 N.E.2d at 835. The complaint contained no allegation that the defendant knew his statement that the $500,000 bequest would exhaust the estate was false or that the decedent was deceived by the statement or acted upon it. Id. at 388, 96 N.E.2d at 835.
96. Id. at 494-95, 425 N.E.2d at 1188.
of an oral agreement between him and plaintiff's mother. Following the death of the plaintiff's mother, plaintiff's stepfather went to live with the defendants, who allegedly induced him to make a new will leaving almost all of his property to his daughter, one of the defendants. After the stepfather's death, however, the defendants could not locate the originals of any of his wills. Consequently, his entire estate passed to the defendant stepsister by intestacy. The plaintiff filed a complaint alleging malicious interference with an expectancy. The circuit court dismissed the complaint.

On appeal, the appellate court held that the plaintiff's allegations were sufficient to maintain the tort cause of action. This decision was based, in part, on a nonheir's right to bring such an action as implied by the Lowe decision. The court also found support for its recognition of the tortious interference action in the Restatement of Torts, which imposes liability on one who tortiously interferes with the inheritance or gift of another.

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97. Id.
98. Id. at 495, 425 N.E.2d at 1188.
99. Id.
100. Id. at 494, 425 N.E.2d at 1188.
101. Id. at 497, 425 N.E.2d at 1187. After remand, the defendants appealed the trial court's judgment for plaintiff of $300,000 in damages. Nemeth v. Banhalmi, 125 Ill. App. 3d 938, 466 N.E.2d 977 (1984). The defendants contended that the plaintiff failed to exhaust her probate remedies and did not prove the essential elements of her cause of action. The court found that these issues were waived when defendants failed to raise them in the trial court. Despite the finding of waiver, the court briefly discussed the Robinson decision. The court suggested that the exhaustion of probate remedies is necessary only where a will has been admitted to probate. Furthermore, where no will has been submitted, a plaintiff need not provoke a situation which would make the statutory remedy available rather than pursue her tort remedy. For the statutory remedy to be available in Nemeth, the plaintiff would have had to attempt to probate the earlier will, thus provoking the defendants to present proof that it was revoked by the later will, at which point the plaintiff would have been able to contest denial of admission of the earlier will to probate.

The court distinguished actions for malicious interference and actions for destruction of a will. In the latter cases, the tortious conduct alleged is the destruction, concealment, or other suppression of a valid will after the decedent's death. Where probate statutes or case law permit probate of a lost will, that procedure should be followed, unless it appears that proof of the will in a probate proceeding has been rendered impossible by the defendant's actions. Cases of malicious interference involve establishing the invalidity of a previously probated will. In these cases, the claim of tortious interference could be asserted during the proceedings to admit the allegedly invalid will to probate or in a will contest.

102. Id. at 499, 425 N.E.2d at 1190.
103. The Restatement of Torts provides that:

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.

Restatement (Second) of Torts § 774B (1977).
In addition, the Nemeth court relied upon cases from other jurisdictions which had recognized the tort action for wrongful interference.\textsuperscript{104} The court noted that those cases used one of two rationales: one, that no wrong is without a remedy; or two, that no policy reasons exist that would preclude protection to an expectancy in a noncommercial context.\textsuperscript{105} The court found this second rationale to be a sound basis for recognizing the tort action.\textsuperscript{106}

The decision also discussed the nature of the expectancy to be protected. Guidance was given to future litigants in that the court noted that some steps toward perfecting the bequest should be taken by the testator if the tort action is to be allowed.\textsuperscript{107} While the court commented that in most of the cases from other jurisdictions the plaintiff was a legatee under a will which was affected in some way by the defendant's fraudulent conduct,\textsuperscript{108} it did not mention the necessity of exhausting available probate remedies before bringing the tort action.

The Nemeth decision was significant because it clearly estab-

\begin{footnotesize}
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\item[105.] Id. at 498, 425 N.E.2d at 1190.
\item[106.] Id. at 498, 425 N.E.2d at 1191.
\item[107.] Illinois recognized the cause of action of interference with prospective economic advantage in Doremus v. Hennessey, 176 Ill. 608, 615, 52 N.E. 924, 926 (1898). The essential elements of the tort are the plaintiff's reasonable expectancy of entering into a valid business relationship, the defendant's knowledge of the expectancy, intentional interference by the defendant which prevents the expectancy from developing into a valid business relationship, and damages. See Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc., 16 Ill. App. 3d 709, 713-14, 306 N.E.2d 549, 553 (1973), modified on other grounds, 61 Ill. 2d 129, 334 N.E.2d 160 (1975). For a comprehensive discussion of interference with commercial expectancies in Illinois, see Broida & Handler, supra note 23.
\item[108.] Nemeth, 99 Ill. App. 3d at 498, 425 N.E.2d at 1190-91 (quoting Mitchell v. Langley, 143 Ga. 827, 835, 85 S.E. 1050, 1053 (1915)):

A bare possibility may not be [protectible]. But where an intending donor, or testator, or member of a benefit society, has actually taken steps toward perfecting the gift, or devise, or benefit, so that if left alone the right of the donee, devisee, or beneficiary will cease to be inchoate and become perfect, we are of the opinion that there is such a status that an action will lie, if it is maliciously and fraudulently destroyed, and the benefit diverted to the person so acting, thus occasioning loss to the person who would have received it.

Nemeth, 99 Ill. App. 3d at 498, 425 N.E.2d at 1191. The cases which the court cited wherein the plaintiffs were legatees under a will which had been revoked, destroyed or modified included: Newsom v. Estate of Haythorn, 125 Ind. App. 276, 122 N.E.2d 149 (1954); Frohwein v. Haesemeyer, 264 N.W.2d 792 (Iowa 1978); Creek v. Laski, 248 Mich. 425, 227 N.W. 817 (1929); Dulin v. Bailey, 172 N.C. 608, 90 S.E. 689 (1916); Morton v. Petitt, 124 Ohio St. 241, 177 N.E. 591 (1931).
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lished the availability of a cause of action for tortious interference in Illinois. Furthermore, it delineated the elements of proof for recovery under the tort: (1) the existence of an expectancy; (2) intentional interference with the expectancy by the defendant; (3) the involvement of tortious conduct, such as fraud, duress, or undue influence, in the interference; (4) reasonable certainty that the gift to plaintiff would have been received but for defendant’s interference; and (5) damages.109 Because no will was ever admitted to probate in the Nemeth case, however, its broad holding did not address the possible conflict between the tort remedy it recognized and the long-standing view of will contest proceedings in Illinois.110 Two years later, this conflict was brought sharply into focus in Robinson v. First State Bank of Monticello.111

Robinson v. First State Bank of Monticello

Robinson was the first Illinois Supreme Court case to discuss the tort action for intentional interference with inheritance. In Robinson, the decedent had executed a will in 1973 naming five unrelated individuals as legatees. That will was revoked by a 1974 will and a 1976 codicil which left substantially all of the decedent’s estate to defendant Doss, who was decedent’s friend, confidant and legal adviser.112 After the 1974 will and 1976 codicil were admitted to probate, the plaintiffs, who were the decedent’s heirs, Doss, and the legatees under the 1973 will entered into a written settlement agreement.113 Two years after signing the agreement, the plaintiffs filed suit against the defendant bank for breach of fiduciary duty and for concealment of a document which purported to revoke the first will of the decedent and against defendant Doss for intentional interference with inheritance.114 The plaintiffs in Robinson did not specifically raise any issues with regard to the validity of the decedent’s will or codicil, and sought no damages against the estate.115

The trial court dismissed all three counts.116 The appellate court, however, held that the plaintiffs’ complaint against Doss did

110. See supra notes 59-80 and accompanying text.
111. 97 Ill. 2d 174, 454 N.E.2d 288 (1983).
112. Id. at 176, 454 N.E.2d at 289.
113. Id. at 176-77, 454 N.E.2d at 290.
114. Id. at 180, 454 N.E.2d at 291.
115. Id. at 181, 454 N.E.2d at 292.
116. Id. at 181-82, 454 N.E.2d at 292. The trial court dismissed all three counts with prejudice, but without a finding of fact, conclusion of law, or any other reason for dismissal.
state a valid cause of action for tortious interference. On appeal, the Illinois Supreme Court again dismissed all three counts. The court stated that underlying the plaintiffs' whole complaint was the necessary determination that the decedent's 1974 will and 1976 codicil which were admitted to probate and became valid under the Probate Act of 1975 were invalid. The will and codicil were found to be valid, because no direct proceeding had been brought to contest the will within the statutorily prescribed time period.

Plaintiffs relied upon Lowe and Nemeth in the count for tortious interference against Doss. The court, however, distinguished these cases on a factual basis. The court noted that the plaintiff in Lowe, unlike the plaintiffs in Robinson, did bring an appeal to contest the order admitting the codicil to decedent's will to probate. Furthermore, in Nemeth, no will was ever admitted to probate, so there could not be a contest of the admission of the will to probate under the Probate Act, as there could have been in Robinson. Therefore, the court refused to accept Nemeth as authority for the plaintiffs' assertion that Illinois recognizes a cause of action for intentional interference with inheritance. The court held that in a probated estate where a will contest remedy was available, it would not recognize a cause of action in tort.

In denying the plaintiffs an opportunity to maintain their tort action, the Robinson court stressed the importance of limiting the time in which the validity of a will could be questioned and of creating stability in the administration of estates. The court

117. Robinson v. First State Bank of Monticello, 104 Ill. App. 3d 758, 766, 433 N.E.2d 285, 291 (1982). The appellate court affirmed the trial court's dismissal of the counts against defendant bank, referring to it as a late will contest. Id. at 763-64, 433 N.E.2d at 289. Although the court referred to the importance of the exclusivity and time limitations of will contests in its discussion of the counts against the bank, it did not mention the line of will contest cases in its discussion of the count against Doss.

118. Robinson, 97 Ill. 2d at 186-87, 454 N.E.2d at 294-95.

119. ILL. REV. STAT. ch. 110½, ¶¶ 1-1 to 30-3 (1983).

120. Robinson, 97 Ill. 2d at 182, 454 N.E.2d at 292.

121. Id. at 183, 454 N.E.2d at 293.

122. See supra notes 84-110 and accompanying text.

123. Robinson, 97 Ill. 2d at 185, 454 N.E.2d at 294.

124. Id.

125. Id. In its holding, the court noted that the will had been admitted to probate and that after hiring an attorney, the plaintiffs had decided not to contest the will. Furthermore, the plaintiffs had entered into a settlement agreement for $125,000 and agreed to release the other parties, including defendant Doss, from any further claims. Finally, the plaintiffs had allowed the statutorily prescribed period for the filing of the will contest to expire, and thus the validity of the will was established. Id.

126. Id. The court quoted Pedersen v. Dempsey, 341 Ill. App. 141, 93 N.E.2d 85 (1950), for the rationale for the limit on filing will contests: "the pressing importance of
stated that the time considerations, along with the goal of assuring the exclusivity of a will contest, were some of the purposes behind the Probate Act. Accordingly, to allow the tortious interference action to be relitigated years after the will had been admitted to probate and had become valid under the Probate Act would circumvent the statute.127

**ANALYSIS**

*Robinson* was an outgrowth of the earlier Illinois cases involving will contests and the applicable statutory time limitations.128 The decision is important for the limitations it imposes on the availability of the tort action for interference that was recognized by the Nemeth court.129 Moreover, in light of the precedents and policy considerations, the *Robinson* case was correctly decided. The decision is in accordance with the long standing policy in Illinois regarding the importance of the exclusivity of will contests.130 In addition, *Robinson* follows the view of the majority of courts from other jurisdictions by denying the use of a tort remedy where probate relief is available.131

The majority view requires the exhaustion of probate remedies before a tort action will be permitted.132 While this rule maintains the integrity of the probate system, it also allows the plaintiff the additional protection of the tort remedy where probate remedies are not adequate or available.

*Robinson* highlights the potential conflict between statutory and tort remedies when plaintiffs are seeking relief for intentional interference with inheritance. When both types of relief are available, it may be preferable to limit the plaintiff's choice to the probate remedy because this remedy will provide adequate relief in most cases of intentional interference. Where a will has been fraudulently induced, the court can refuse to admit it to probate.133 If a will has been wrongfully suppressed or destroyed, the court can provide relief by probating the lost or destroyed will.134 Even if a will has

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127. *Robinson*, 97 Ill. 2d at 185-86, 454 N.E.2d at 294.
128. See supra notes 62-79 and accompanying text.
129. See supra notes 101-09 and accompanying text.
130. See supra notes 61-65 and accompanying text.
131. See supra notes 39-43 and accompanying text.
132. See supra notes 6, 41-48 and accompanying text.
133. See supra note 12.
134. See supra note 14.
been admitted to probate, a remedy exists in the form of a will contest.\footnote{See supra note 13.}

If plaintiffs were permitted to bring an action at law rather than follow the statutorily mandated estate administration procedures, the efficacy of the system would be diminished. Probate proceedings should come to a certain and final resolution within a reasonable period of time in order to avoid confusion and protect creditors and others.\footnote{Luther v. Luther, 122 Ill. 558, 566, 13 N.E. 166, 169 (1887). In Case of Broderick's Will, 88 U.S. (21 Wall.) 503 (1874), the court stated:

*The public interest requires that the estates of deceased persons, being deprived of a master, and subject to all manner of claims, should at once devolve to a new and competent ownership; and, consequently, that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with least chance of injustice and fraud; and that the result attained should be firm and perpetual.*

88 U.S. at 509.}

If a tort action may be brought months or even years after the validity of the will has been established in the probate proceedings, the final settlement of all matters relating to the estate could be delayed and the rights of the parties may be prejudiced.\footnote{See Ogle v. Fuiten, 102 Ill. 2d 356, 466 N.E.2d 224 (1984). In Ogle, the court allowed a negligence action to be brought against the attorney who had prepared testator's will. Because the will did not properly reflect the testator's intent, the beneficiaries did not receive a bequest. The court distinguished the undue influence issue in Robinson from the negligence question in Ogle, noting that the plaintiffs in Ogle could not have pursued their claims in a will contest. Therefore, the negligence action was not a collateral attack on the probate decree.}

States have enacted probate statutes to prevent such an occurrence.\footnote{See, e.g., Estate of Ariola v. Ariola, 69 Ill. App. 3d 158, 171, 386 N.E.2d 862, 872 (1979) (the purpose of the Probate Act is to permit an administration to get underway as quickly as possible, yet still provide an adequate opportunity to test the validity of the will); Carney v. Kosko, 229 Md. 112, 117-18, 182 A.2d 28, 30 (1962) (it is the policy of the Testamentary Act to promote the prompt probate of wills); Hanna v. Sheetz, 205 S.W.2d 955 (Mo. App. 1947) (the code is designed to expedite the final administration of estates in as short a time and with as little expense as possible); In re Arnold's Will, 125 N.Y.S.2d 782, 785 (1953) (the purpose of a probate proceeding is to encompass every possible claim and interest that might concern the estate so that when the assets of the estate pass to the new owners, clear title vests in them); Lillard v. Tolliver, 154 Tenn. 304, 315, 285 S.W. 576, 579 (1926) (probate proceedings should not only determine who is entitled to inherit the property from the deceased, but also hasten the administration of the estate and the payment of debts).} Plaintiffs should not be permitted to sidestep these statutory provisions where the same issue, the validity of the will, would be decided in both the probate proceedings and the tort action. The situation in Robinson was clearly one in which the tort action would have had the same consequences as a will contest.

In Robinson, if the plaintiffs had successfully maintained their
action for intentional interference with inheritance, defendant Doss would have lost the same property he would have been deprived of if the will and codicil had been declared invalid in a will contest. The same issue, Doss's undue influence on the testator, was at the core of both actions. Since that matter was settled during the probate proceedings, the plaintiffs' tort action would have been an impermissible collateral attack on the probate decree.

Allowing the plaintiffs to bring their action for tortious interference after the statutory period for a will contest had expired would also have been contrary to the policy requiring that the integrity of the probate process be maintained. In Robinson, the plaintiffs clearly had an opportunity to pursue a will contest during the probate proceedings. Not only did they hire an attorney before deciding not to contest the will, but they also entered into a settlement agreement releasing the other parties from any further claims. They then allowed the statutory period for the will contest to expire before instituting the tort action.

In light of these considerations, where a will contest remedy is available and adequate, as in Robinson, the court should not allow the plaintiff to bring a tort action which would have the effect of setting aside the validity of a will as determined by the probate proceedings. This rule would also preclude the use of the tort remedy during the six month period for will contests, if the latter remedy were available. One problem, however, is that in certain situations it is difficult to ascertain whether the probate remedy is adequate. Moreover, the narrow holding of Robinson left this question unanswered.

Determining the Adequacy of the Probate Remedy

Although an adequate probate remedy should be available in dealing with most wills, the probate court cannot deal with what

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139. Robinson, 97 Ill. 2d at 186, 454 N.E.2d at 294. In denying the tort action, the court remarked: "Given the facts in this case, if we were to allow the plaintiffs to maintain their tort action, we would be giving them a second bite of the apple and defeating the purpose of the exclusivity of a will contest. . . ."

140. See supra notes 16-17 and accompanying text.

141. See supra note 48 and accompanying text.


143. Id.

144. See supra notes 62-65 and accompanying text.

145. See Allen v. Lovell's Adm'r, 303 Ky. 238, 197 S.W.2d 424 (1946) (attempt should be made to probate destroyed will during statutory period before tort relief may be sought).

does not exist. Thus in certain situations, a probate remedy is clearly not available. For example, where the testator has been wrongfully prevented from making a will,\textsuperscript{147} and as a result thereof no probate proceeding is possible, a tort action should be allowed. Similarly, the plaintiff should be permitted to seek relief in tort where the defendant has caused the testator to make a fraudulent inter vivos conveyance that reduces the amount of the estate to be inherited by the plaintiff.\textsuperscript{148}

There are some situations in which the plaintiff may have an available will contest remedy, but may not have an opportunity to present his case. For example, the plaintiff may not discover the tortious conduct of the defendant regarding the will until after the statutory period for the will contest has expired.\textsuperscript{149} Because there is no longer an adequate probate remedy available, the plaintiff should be allowed to bring a tort action. The same result should follow where the plaintiff does not have proper notice of the probate proceedings and thus does not have an opportunity to contest the will.\textsuperscript{150} In addition, if there has been fraud on the court during the proceedings as a result of which the plaintiff has not had a fair determination, the probate decree should be held void and a tort action permitted.\textsuperscript{151} In these situations, the issue of the validity of the will has not been fully and fairly litigated during the probate proceedings; therefore, a later determination relating to the same issue should not be considered a collateral attack on the probate decree.

In certain circumstances, the plaintiff may appear to have an opportunity for a fair hearing on the issue of the validity of a will during the hearing to admit the will to probate, but in fact may be unable to prove his case because of the fraudulent actions of the defendant. At the hearing, the sole question presented is whether the will submitted to probate meets the statutory requirements.\textsuperscript{152}

\textsuperscript{147} The tort action was recognized on these grounds in Bohannon v. Wachovia Bank & Trust Co., 210 N.C. 679, 180 S.E. 390 (1936).
\textsuperscript{148} See, e.g., Cyr v. Cote, 396 A.2d 1013, 1017-18 (Me. 1979).
\textsuperscript{149} This was the factual situation in Morton v. Petitt, 124 Ohio St. 241, 243-44, 177 N.E. 591, 592 (1931), where the court held that plaintiff's petition, alleging that the defendants fraudulently suppressed the testator's last will, stated a cause of action although he did not discover the fraud until twenty years after the testator's death.
\textsuperscript{150} See, e.g., Weyant v. Utah Sav. & Trust Co., 54 Utah 181, 203, 182 P. 189, 201 (1919) (probate decree set aside where deserted family had no notice of proceedings given under decedent's assumed name).
\textsuperscript{151} See supra note 18.
\textsuperscript{152} It has long been recognized that the proof necessary to entitle a will to probate is confined to the essential elements fixed by the statute. . . and is for the purpose of establishing whether a \textit{prima facie} case of validity has been made
Where the defendant wrongfully induces the testator to draw a will or codicil which the defendant knows is invalid,\(^1\) fraudulently prevents the revocation of a will,\(^2\) destroys or suppresses a will,\(^3\) or fraudulently removes provisions of a will that are beneficial to the plaintiff,\(^4\) the plaintiff may not be able to present the necessary proof on the issue of the validity of the will.\(^5\) At the hearing, the plaintiff may present competent evidence on the issue of fraud, forgery, compulsion or other improper conduct sufficient to invalidate the will.\(^6\) There may be difficulty in gathering such evidence, however, because of the lack of discovery at this stage of the proceedings.\(^7\)

Despite the fact that the defendant’s wrongful conduct may preclude the plaintiff from prevailing in the initial probate hearing, the

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\(^1\) Ruffing v. Glissendorf, 41 Ill. 2d 412, 420, 243 N.E.2d 236, 240 (1968).
\(^3\) See Evans, supra note 1, at 196.
\(^6\) The formal statutory requirements for the admission of a will to probate are met:

(a) When each of 2 attesting witnesses to a will states that (1) he was present and saw the testator or some person in his presence and by his direction sign the will in the presence of the witness or the testator acknowledged it to the witness as his act, (2) the will was attested by the witness in the presence of the testator and (3) he believed the testator to be of sound mind and memory at the time of signing or acknowledging the will. . .


Illinois courts also permit the issue of revocation of the preferred will to be litigated at the hearing. In re Estate of Millsap, 75 Ill. 2d 247, 388 N.E.2d 374 (1979). Under the Illinois Probate Act:

A will may be revoked only (1) by burning, cancelling, tearing or obliterating it by the testator himself or by some person in his presence and by his direction and consent, (2) by the execution of a later will declaring the revocation, (3) by a later will to the extent that it is inconsistent with the prior will or (4) by the execution of an instrument declaring the revocation and signed and attested in the manner prescribed by this Article for the signing and attestation of a will.


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\(^7\) See, e.g., In re Estate of Haines, 51 Ill. App. 3d 163, 366 N.E.2d 548 (1977); In re Estate of Kvasauskas, 5 Ill. App. 3d 202, 282 N.E.2d 465 (1972). In Kvasauskas, the appellate court found that the trial court did not abuse its discretion when it denied the discovery sought by the contestant prior to the hearing for admission of the will to probate, because “the procedure provided in the probate act for the prompt and orderly administration of estates should not be unnecessarily delayed where the rights of all interested parties are already adequately safeguarded.” Id. at 204, 282 N.E.2d at 467.

plaintiff has an additional opportunity to present his case during a will contest.\textsuperscript{160} In that proceeding, the full panoply of discovery tools is available and should be utilized.\textsuperscript{161} Moreover, a presumption of undue influence relating to certain fiduciaries may aid the plaintiff in the will contest.\textsuperscript{162} On the other hand, the plaintiff's case may be weakened by his inability to include evidence of declarations by a testator which would impeach or contradict the will.\textsuperscript{163} The evidentiary rules mentioned above relating to the presumption of undue influence and the exclusion of certain declarations by a testator are unique to will contests;\textsuperscript{164} therefore, the outcome of the litigation may depend on whether the plaintiff brings his action in the form of a will contest or in tort. The question remains open whether the plaintiff should be allowed to choose the more favorable forum for his case. Given the Illinios courts' long-standing interest in facilitating the administration of estates through the exclusive use of will contests, it appears that the plaintiff should be required to pursue his remedy in the probate proceedings unless he clearly cannot have a fair determination there. If the defendant's conduct by itself completely precludes the presentation of the plaintiff's case, the plaintiff should be allowed to bring a tort action. The defendant should not be allowed to profit from his wrongdoing in such a situation, regardless of the policy favoring the use of probate proceedings in cases of wrongful interference with inheritance.

CONCLUSION

Parties deprived of a legacy by the wrongful conduct of others have often found relief in probate and equitable remedies. The tort action for intentional interference with inheritance has developed as an alternative remedy. Illinois courts recognized the tort in \textit{Nemeth}, but recently limited its use in \textit{Robinson}. The majority of jurisdictions which recognize the tort consider the action an impermissible collateral attack on the probate decree where an adequate

\textsuperscript{160} ILL. REV. STAT. ch. 110½, ¶¶ 8-1, 8-2 (1983).
\textsuperscript{161} Kvasauskas, 5 Ill. App. 3d at 204, 282 N.E.2d at 466.
\textsuperscript{162} For a presumption of undue influence to exist, the plaintiff must show: "(1) there [is] a fiduciary or confidential relationship, (2) that the devisee is the dominant and the testator is the dependent party, and (3) that the will was procured by and in favor of the fiduciary through the use of his dominant fiduciary or confidential relationship." Belfield v. Coop, 8 Ill. 2d 293, 309, 134 N.E.2d 249, 258 (1956) (quoting Redmond v. Steele, 5 Ill. 2d 602, 612, 126 N.E.2d 619, 625 (1955)).
\textsuperscript{163} Mosher v. Thrush, 402 Ill. 353, 84 N.E.2d 355 (1949); Pollock v. Pollock, 328 Ill. 179, 159 N.E. 305 (1927); Waters v. Waters, 222 Ill. 26, 78 N.E. 1 (1906).
\textsuperscript{164} Mason, \textit{supra} note 159, at 500.
remedy is available in the probate proceedings. Robinson is consistent with this view and is also proper in light of Illinois precedent and policy supporting the exclusivity and time limitations of will contests.

After Robinson, where an adequate probate remedy is available and the plaintiff has a reasonable opportunity to be heard and may obtain full relief in the probate proceedings, use of the tort remedy will not be permitted. Every wrong must have a remedy, however, and if the plaintiff cannot obtain adequate relief in probate, his right to such relief should outweigh the policies favoring the orderly settlement of estates and he should be permitted to maintain an action for tortious interference with inheritance.

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