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Revenge of the Disappointed Heir: Tortious Interference with Expectation of Inheritance - A Survey with Analysis of State Approaches in the Fourth Circuit

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REVENGE OF THE DISAPPOINTED HEIR: Tortsious Interference with Expectation of Inheritance – A Survey with Analysis of State Approaches in the Fourth Circuit

Diane J. Klein*

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I. INTRODUCTION

The inherent drama of the scene has made it almost a cliché of movies and

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television: after the death of a wealthy family member, the group of greedy and bereaved survivors gather in a lawyer’s office for the climactic “reading of the will,” which inevitably contains the unexpected. In real life as well, the contents of a will often contain both pleasant and unpleasant surprises for the decedent’s “nearest and dearest.” Those who expect to inherit a great deal may receive little or nothing. Sometimes, the disappointed parties believe that someone other than the decedent is to blame for this unhappy turn of events. They want to sue someone.

Historically, their only remedy was a will contest, known in some states as a “caveat proceeding.” A will contest, which usually takes place in a specialized state probate court, is an in rem proceeding against the estate of the decedent. Generally, the estate bears the cost of defending the proffered will. In theory, a will contest offers all interested parties the opportunity to determine whether the document presented for probate is in fact the testator’s last will (not revoked, superseded, or procured by fraud or undue influence), and to establish the disposition intended by the deceased. This process is attended with special formalities and high standards of proof, intended primarily to protect the testator, who of course cannot testify personally (on account of being dead).

In some situations, however, a will contest will not work. To begin with, if the intended beneficiary is not related to the testator or named in a prior instrument, he or she may lack standing to bring a will contest at all. For those who have standing, even if the contest is successful and the will is not admitted to probate, there is no guarantee that the testator’s intended disposition will take its place. The disappointed person may be unable to prove to the satisfaction of the probate court that he or she is entitled to anything. In other cases, the decedent may die intestate, having been prevented from making a will in favor of a particular person, raising similar problems of proof. An expected inheritance

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2 In some cases, the estate also pays the costs of certain good-faith challenges to the will. Curtis E. Shirley, Tortious Interference With an Expectancy, 41 RES GESTAE, Oct. 1996, at 16 (“Normally, the estate pays both defense attorney fees and those of a plaintiff making a good faith attempt to probate a prior will.”).

3 Because the tort covers situations in which the would-be testator was prevented from making a will by the tortfeasor, it is an overstatement to say, as Shirley does, “The tort assumes a confluence of an overt act by the testator and wrongful conduct by the defendant which precipitate change in an estate plan.” Id. at 17. There may be no such overt act.
may take the form of benefits under a revocable trust or other non-probate asset, not covered by the will and hence not reachable by the probate court. The estate may have been depleted through wrongfully-procured *inter vivos* transfers. As a practical matter, disappointed heirs may settle for considerably less than they are entitled to receive, in order to avoid dissipating the estate through a lengthy and expensive will contest. In these and other situations, a will contest simply does not offer the disappointed person a way to obtain the intended legacy. As a result, more and more courts have recognized the need for a remedy outside the probate process.

The tort of intentional interference with expectation of inheritance is one such alternative remedy, recognized in some, but by no means all, of the states. The tort first appeared in the Restatement of Torts in 1979, codified as follows: "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." The most recent A.L.R. annotation on the subject identifies the elements of the tort as "the existence of the expectancy; that the defendant intentionally interfered with the expectancy; that the interference involved tor-

4 Some of these examples are drawn from Shirley, *supra* note 2, at 16, which contains other examples as well.


6 Possible remedies, depending somewhat upon the type of interference, are: (1) the raising of a constructive trust; (2) resistance to or setting aside of probate in the probate court; (3) setting aside of probate in equity; (4) a tort action for wrong to the plaintiff's expectancy or some substantially equivalent action at law or in equity.

Alvin Evans, *Torts to Expectancies in Decedents' Estates*, 93 U. PA. L. REV. 187, 187 (1944). Although some courts evaluate the tort remedy in comparison to such remedies as an equitable action for rescission or a constructive trust, among states in the Fourth Circuit, those that recognize the tort do not explore this alternative remedy. See *infra* Part II. However, the Maryland courts, which do not recognize the tort, do endorse equitable remedies to the extent necessary to carry out the will of the testator. Geduldig v. Posner, 743 A.2d 247, 256-57 (Md. Ct. Spec. App. 1999) ("Traditionally, claims attacking the distribution of estate and trust assets based on undue influence and fraud were equitable actions. Equity courts could award pecuniary relief if necessary to accomplish complete relief (e.g., when dissipation of assets prevented the traditional equitable remedy). But these decisions were in the context of traditional equitable remedies such as rescission, specific performance, injunctive relief, constructive trusts, and the like . . . . In actions to set aside wills or trusts, equity focused on rectifying a situation wherein the testator or the settlor was not able to dispose of his or her estate freely . . . . The correction of that harm was a result of righting the wrong to the testator or settlor.").
tious conduct such as fraud, duress, or undue influence; that there was a reasonable certainty that the plaintiff would have received the expectancy but for the defendant’s interference; and damages.”

At least one appellate court in each of the states in the Fourth Circuit—Maryland, North Carolina, South Carolina, West Virginia, and Virginia—has addressed the question of whether to recognize the tort of intentional interference with expectation of inheritance, with widely differing results. Although

8 Sonja Soehnel, Annotation, Liability in Damages For Interference With Expected Inheritance or Gift, 22 A.L.R. 4th 1229 (1983). See also Fassold, supra note 5, at 27 (citing two Illinois cases). A Missouri-specific discussion of the tort and its elements can be found in Reaves, supra note 5.

North Carolina was one of the first states in the United States to recognize this tort. West Virginia is the only other state in the Fourth Circuit to recognize the tort. The Maryland Court of Appeals, Maryland's highest court, had not addressed the tort as of 1999, the year of the most recent reported case in which an intermediate appellate court declined to recognize it. A 1999 decision of a South Carolina intermediate appellate court declining to recognize the tort was affirmed by the South Carolina Supreme Court in 2001. In 2000, the Virginia Supreme Court explicitly declined to recognize it.

Part II of this Article situates this up-and-coming tort theoretically, in the interstices – one author calls it a "twilight zone" – between probate and tort law. Part III describes the legal history and current status of the tort in the two Fourth Circuit states that recognize it (North Carolina and West Virginia), and provides an analysis of the elements of the tort in each state. Part IV reviews the state of the law in the remaining three states of the Fourth Circuit that do not recognize the tort (Maryland, South Carolina, and Virginia).

Part V changes gears somewhat, to examine a very significant procedural/choice of forum issue, namely, whether the tort claim can be brought in federal court under diversity jurisdiction, or is barred by the "probate exception." The Fourth Circuit has a well-developed jurisprudence on the probate exception, although no cases specifically address whether the tort falls into or outside of it. However, the Fourth Circuit applies a uniform method for determining whether a claim falls outside the probate exception, and this method is so closely related to the method used by state courts in deciding whether to recognize the tort itself that a close reading of the probate exception cases offers not only procedural guidance in the states that recognize the tort but also a fruitful basis for speculation about recognition of the tort in the states that have not yet done so.

II. A DESCRIPTION OF THE TORT AND ITS RATIONALE

Unlike the tort system, which addresses the injuries suffered by living persons,11 the probate regime quite naturally focuses on the rights of the testator

(plaintiffs' "claim that the probate court could not have considered actions in tort, such as interference with the parent/child relationship, or the tort of interference with a parent's testamentary gifts. This is not the law in Washington, however. We hold that although the probate action was ostensibly in rem, it may have res judicata effect in a later in personam tort action" (first emphasis added)). The remaining sixteen states (Alaska, Arizona, Hawaii, Idaho, Mississippi, Nebraska, Nevada, New Hampshire, North Dakota, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Washington, and Wyoming) have no reported cases addressing or even mentioning the tort.

10 Evans, supra note 6.

11 Even a cause of action for "wrongful death" is brought by survivors legally damaged by the death, and/or the estate, which sues for the benefit of the heirs. Hence, for example, damages recoverable under a state's wrongful death law on account of a decedent's death (which include nothing for the pain, suffering, or expenses of the decedent during his lifetime) are not includible in his estate as property owned at death. Connecticut Bank & Trust Co. v. United
(or intestate decedent, or donor *inter vivos*) to make the disposition he or she desires. The right to alienate property freely, in life and at death (freedom of testation) is a cornerstone of the American property regime, even more so than of the British system from which it derives. One way this is reflected is that testators have a right to completely disinherit nearly anyone, and there is no "right to inherit."13

Naturally, this focus on the property owner’s rights does not mean that the probate system turns a blind eye to misconduct relating to testamentary gifts. Tortious conduct, such as the use of undue influence, threats, or coercion to procure a particular disposition, is understood as a legal wrong, but only against the testator whose right of free testation is infringed upon, not the beneficiary. Because there is no right to inherit, any purported injury to the intended recipient is not cognizable. Nor, on this approach, need it be, for the probate system through the will contest or caveat proceeding offers all interested parties a forum in which to litigate the testator’s true intentions.

As the A.L.R. enumeration of the tort elements should at least suggest, the wrongful conduct addressed by the tort of intentional interference with expectation of inheritance nearly always includes at least a wrong committed against the testator (and not just against a beneficiary). Someone’s tortious interference with another’s inheritance generally involves influencing the testator improperly (for example, by threats or trickery), or acting improperly with regard to the testator’s will (for example, changing it, destroying it, or preventing its proper execution). However, although an injury to the testator is a natural concomitant to the tort, the tort is not a remedy for testators (or their estates). As the Restatement illustrates, the tort represents a fundamental and significant shift of focus away from the testator and onto the wronged would-be beneficiary. Although a will contest centers on what the testator intended, the tort also

12 "In all states except Louisiana, a child or other descendant has no statutory protection against disinheritance by a parent. There is no requirement that a testator leave any property to a child, not even the proverbial one dollar.” JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 536 (6th ed. 2000). Spousal elective and forced-share statutes limit this freedom to some extent. “Almost all of the separate property states [provide protection against disinheriting to surviving spouses] by giving the surviving spouse, by statute, an elective (or forced) share in the estate of the deceased spouse.” Id. at 472. In community property states, although the surviving spouse receives half of what was formerly community property, the decedent is free to leave half the community property as he or she wishes.

13 See, e.g., Bemis v. Waters, 170 S.E. 475, 476 (S.C. 1933) (“During the lifetime of an ancestor, there are no heirs and certainly no vested right to inherit from such ancestor. There frequently is an ‘expectant interest.’ But the voluntary act of the ancestor, done in a perfectly legal way, frequently renders this expectancy a mere delusion. . . . The right to inherit, during the life of an ancestor, does not exist.”).
looks to the tortfeasor's intent.\(^\text{14}\) It highlights – and seeks to prevent or correct – the wrongful conduct of the tortfeasor \textit{vis-à-vis} a beneficiary, not the testator.

But the differences between a will contest and the tort go well beyond such abstractions of "focus." As an action at law, compensatory and punitive\(^\text{15}\) damages are recoverable by a person tortiously injured by a third party's interference with his or her expected inheritance.\(^\text{16}\) As a legal claim \textit{in personam} against the interfering tortfeasor, the costs of prosecuting and defending the action – and paying a judgment, if the action is successful – are borne by the parties, not the estate. In contrast to a will contest or probate claim, the tort defendant must answer.\(^\text{17}\) In addition, pre-judgment interest, attorney's fees, and punitive damages beyond the lost legacy are potentially recoverable.\(^\text{18}\) Importantly, a jury is also available.\(^\text{19}\) In at least some states, a federal forum may also be em-

\(^{14}\) Some commentators go too far in de-emphasizing the continuing role of the testator's intent. For instance, one commentator has stated,

In contrast to a will contest based on undue influence, where the contestant must establish that the free will of the testator was overborne, a tortious interference claim does not require such a proof. Rather, the focus is on the defendant's intention: whether the defendant intended to interfere with an inheritance and acted on that intention.

Fassold, \textit{supra} note 5, at 27 (citing Shirley, \textit{supra} note 2, at 18). Another has stated,

In a will contest, the plaintiff alleging undue influence must show that the decedent's free agency was destroyed and the decedent was constrained to do what was against his will, being unable to refuse or too weak to resist. The tort, however, does not require such proof. The law focuses on the defendant's intent to cause the disinheritance, not on the effect of that intent on the decedent.

Shirley, \textit{supra} note 2, at 18. These statements go too far. First, if the form of tortious interference is undue influence, the ordinary elements of that claim apply. In addition, one crucial determination in the tort claim is whether the testator \textit{intended} to leave anything to the plaintiff. Finally, if the tortfeasor's intent had no effect on the decedent, there will be no tort. Hence, the tort adds an additional question of intent; it does not replace one with another.

\(^{15}\) For the general availability of punitive damages, see \textit{Restatement (Second) of Torts} § 774B, cmt. e (1979). \textit{See also} Fassold, \textit{supra} note 5, at 28; Reaves, \textit{supra} note 5, at note 20.

\(^{16}\) The precise measure of damages (as opposed to identification of the \textit{types} of damages available) is another matter. For a useful discussion of the measure of damages for this tort under Maine law, see Driscoll, \textit{supra} note 5, at 540-42.

\(^{17}\) \textit{See}, \textit{e.g.}, Ind. Code § 29-1-7-17 (1997).

\(^{18}\) Fassold, \textit{supra} note 5 ("Moreover, [the tort] permits the recovery of punitive damages and attorney's fees, which a will contest normally does not."); Reaves, \textit{supra} note 5, at 565; Shirley, \textit{supra} note 2, at 16 ("In the tort litigation [the tortfeasor] would have to pay his own attorney fees and face the possibility of compensatory and punitive damages.").

\(^{19}\) Shirley, \textit{supra} note 2, at 20 ("Almost all cases throughout the country have allowed a jury in the tort action; however, cogent arguments against a jury demand may be raised if the case involves a trust, equitable remedies such as restitution, or a constructive trust over the assets.").
ployed. 20 In all, the tort’s substantive and procedural tools for obtaining bequests for would-be beneficiaries and punishing wrongdoers make it “a powerful weapon” in the arsenal of the disappointed heir. 21

Of course, what a common law tort claim offers the successful plaintiff – punitive damages, attorney’s fees, and a judgment in personam against the tortfeasor – may seem out of place when we think of the goal of the probate system as ensuring that estates are distributed in accordance with the wishes of the decedent. The testator-centered analysis is correct, as far as it goes – the probate court recognizes the wrongs of unduly influencing testators and destroying wills, and it would seem, in principle, that the executor (or personal representative) of an estate could be required to prosecute in probate court any claim required to ensure that the testator’s true wishes are carried out. The problem arises when we consider facts outside what the probate system can accommodate.

Consider one typical tort fact pattern, the testator-parent and a group of four siblings. Assume the parent’s wish is to divide the estate equally among the children, but one child tortiously induces the parent to make a will much more favorable to him. Perhaps this will also names the tortfeasor as executor. Should the other siblings bring a will contest, the estate will pay the costs of defending the will, and we can assume the tortfeasor will defend the will vigorously. Should the siblings succeed in their contest, and strike down the will, the tortfeasor will still collect his one-fourth share by intestacy or a prior will – the same inheritance he would have received had he never committed the tort (albeit reduced by one-fourth of the costs of the defense, if he, as executor, elects to mount one). The probate system thus offers no deterrent at all to the tortious conduct just described. 22

Consider another common fact pattern, the testator who wishes to make a bequest to an unrelated companion who is not the parent of the testator’s adult children, or to an entity like a foundation. A family member’s tortious conduct (such as destruction of a will or prevention of its execution) prevents it. In many cases, the intended beneficiary, as neither an intestate heir nor a taker under a prior will, will lack standing to bring a will contest at all. In other cases, even if the beneficiary has standing, it may be impossible to prove up the gift. The tes-

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20 Whether the plaintiff may file in federal court (or the defendant may remove, pursuant to 28 U.S.C. § 1441) depends on whether the requirements for diversity jurisdiction are met, pursuant to 28 U.S.C. § 1332(a), and also whether the “probate exception” to diversity jurisdiction applies. The contours of the “probate exception” in each state of the Fourth Circuit are discussed in Part V, infra.

21 Shirley, supra note 2, at 20.

22 Fassold has described a similar situation – somewhat misleadingly – as “the perfect crime.” Fassold, supra note 5, at 26 (the tortfeasor “has virtually nothing to lose . . . . [if the wrongfully-procured will is set aside] he is right back where he started, with no penalty paid for his conduct . . . . And regardless of the outcome, [the] estate pays for [the wrongdoer’s] lawyers”). The same situation results if the tortfeasor outright forges a will, and ultimately does not succeed in having it admitted to probate.
tator, of course, is unable to testify, and the contestant's own testimony alone is typically insufficient in probate court. If the will contest succeeds, the tortfeasor may actually receive a larger share of the estate, depending on how intestacy compares to the proffered will.²³

Examples like these (and others²⁴) demonstrate that there are situations in which the probate court is unable fully to correct certain wrongful attempts to frustrate a testator's desires. Hence, even in its own testator-centered terms, the probate system sometimes falls short, creating an opportunity for an extra-probate remedy.²⁵ Because the standard of proof required to prevail in an ordinary civil action is so much less than what is required to establish a bequest in probate court, it is natural to look to the general civil court for that remedy.

Equity is the more traditional option, with its access to remedies such as the constructive trust, which allows a court to ensure that the property ends up in the proper hands without explicitly disturbing the probate decree. However, in our legal culture, the tort regime has become the central locale for punishing civil wrongs. With the merger of law and equity, a range of remedies is available to a victorious tort plaintiff. Moreover, in a legal climate that emphasizes the deterrent effects of the tort regime, a tort approach may appear clearly preferable to a probate system obviously unable to deter certain kinds of wrongful

²³ For example, the intended disposition might be seventy-five percent to mistress, fifteen percent to adult child A, and ten percent to adult child B, the tortfeasor. The disposition by will is sixty percent to child A, forty percent to child B. Under intestacy, the division is fifty percent to child A, fifty percent to child B. If the mistress successfully contests the will but cannot establish the intended disposition, B “wins.”

²⁴ A tortfeasor might use undue influence to induce a testator to replace the name of one beneficiary with that of the tortfeasor in a will. Although the court could refuse probate of that part of the will, “that would not avail the plaintiff [the former beneficiary] in any way.” Evans, supra note 6, at 194. However, as Evans remarks, “Hence, it would be better to probate the will as an entirety and have the defendant declared a trustee. This would probably be a more adequate remedy than a tort action would be, but the latter action should be available.” Id. Presumably, Evans comes to this conclusion on the basis of problems of proof the plaintiff might encounter in setting up the original bequest.

²⁵ Evans, an early commentator and advocate of the tort remedy, is especially vigorous in his advocacy of the tort in the destroyed evidence problem of proof cases.

Where the will has been suppressed or destroyed, it may be probated, if the evidence was not destroyed. This leaves the question still open for an action in tort if the plaintiff should fail in the probate court because of the destruction of evidence by the defendant. . . . Probate may be impossible because the defendant has deprived the plaintiff of the proof required to establish a will. This is a wrong involving the plaintiff's loss of evidence and a tort remedy should be available. This remedy constitutes no attack upon the probate decree. An essentially different cause of action is stated in the complaint . . . . [W]hile the plaintiff cannot have probate in equity [i.e., have the equity court set up the will], it does not follow that he could not have an action in tort because of his loss of evidence, which loss made probate impossible.

Evans, supra note 6, at 202-04.
conduct.

However, the tort has a further conceptual obstacle to overcome. Before the tort can serve as a legal method for deterring and punishing wrongful interference with testamentary and *inter vivos* gifts, courts must come to terms with the inherently speculative and uncertain interest the tort plaintiff possesses. If there is no right to inherit, and a competent testator is free at any time to alter a disposition, it is not clear what right the plaintiff has. Even without the interference, the tort plaintiff might never have been given anything. Some courts have avoided this problem by rejecting the action on the basis that an intended legatee has no legally-protectable right, but only a “mere expectancy.”

For advocates of the tort, what is called for instead is the same shift in focus identified above. The tort is not the right to inherit by another name. What the tort protects is the right *not to be interfered with* in receiving an inheritance. Like a river, the flow of the testator’s generosity might have changed course and left the would-be beneficiary high and dry. But this does not give a third party the right to divert it toward himself. Seen this way, so far from undermining the right of free testation (a power of the donor *vis-à-vis* any donee), the tort protects the exercise of that right from wrongful third-party interference. From this point of view, the tort actually enhances and secures freedom of testation (and *inter vivos* donation).

In addition, although it is well established that in general no one has a right to inherit, our legal culture is becoming more and more comfortable with the idea of legally-protectable expectancies in some circumstances. In fact, the

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26 For a helpful discussion of this issue, see Driscoll, *supra* note 5, at 533-36.

27 See, e.g., Cunningham v. Edward, 3 N.E.2d 58 (Ohio Ct. App. 1936). Evans describes the Cunningham court as holding “[t]he plaintiff’s prospect was held not to be of such legal importance as to warrant the protection of it, inasmuch as he had no vested interest in the decedent’s property.” Evans, *supra* note 6, at 192. The New York court took a similar position in Hutchins *v.* Hutchins, 7 Hill 104 (N.Y. 1845). Connecticut reached a similar result in an *inter vivos* conveyance case, see Hall *v.* Hall, 100 A. 441 (Conn. 1917). As Evans summarized, “The court held that the plaintiff’s expectation was not a legal property interest and that the plaintiff had no cause of action. Thus, here again is a clear refusal to extend to an expectancy of inheritance the protection which has come to be extended in a wide field of transactions.” Evans, *supra* note 6, at 199.

28 One early commentator identifies the issue as “[t]he question of the protection to be extended to expectancies in decedents’ estates from fraudulent interference.” Evans, *supra* note 6, at 187.

29 See, e.g., George J. Blum, Annotation, *Action for Tortious Interference With Bequest as Precluded by Will Contest Remedy*, 18 A.L.R. 5TH 211 (1994) (“It is well established that a party to a contract, whether of employment or otherwise, has a right of action against one who has procured a breach or termination of the document by the other involved party . . . . Interference with a noncontractual relationship may be as actionable as interference with a contractual relationship.”). See also Evans, *supra* note 6, at 204 (There has been a “progressive extension of a tort remedy for the protection of interests in advantageous relations . . . . [p]rospective advantages may be protected,” citing, e.g., protection from tortious interference with an employment relationship, though describing “protection . . . . to expectancies in decedents’ estates from fraudulent interference” as occupying “a twilight zone;” ultimately, Evans concludes “that
tort of intentional interference with expectation of inheritance is often classified with other commercial and non-commercial "interference" torts like interference with contract, interference with prospective economic advantage, interference with prospective employment or business relations, and interference with gift. All of these are relatively contemporary legal innovations that expand the scope of legal rights beyond what has been traditionally recognized, specifically by conferring legal protection on "expectancies." 

In theory, the tort applies to both inter vivos and testamentary transfers, and presents certain challenges to each. But no characterization of the tort as a benign handmaiden to the probate system can disguise the more acute threat it poses to the core business of the probate court. Although effective inter vivos transfers can be quite informal, requiring little more than delivery, testamentary transfers remain highly formal, and are further protected by special probate courts in each state, which are typically given exclusive jurisdiction over wills and estate administration. State law gives probate courts exclusive

interferences with benefits reasonably to be expected from decedents' estates... are, after all, indistinguishable from interferences with prospective advantages in business relations and other types of cases.

This is the approach of the Restatement (Second) of Torts, which identifies the tort of "intentional interference with inheritance or gift" as one form of the tort based on wrongful interference with an expectancy. Restatement (Second) of Torts § 774B (1977). One commentator states, "The cause of action for tortious interference with inheritance expands tort liability for interference with prospective advantages... Since English common law recognized the tort of interference with prospective relations, tortious interference with inheritance is traceable to that law." Marmar, supra note 5, at 297. This is also the explicit approach of the West Virginia courts. See, e.g., Kessel v. Leavitt, 511 S.E.2d 720 (W. Va. 1998) (tortious interference with parental relationship); Torbett v. Wheeling Dollar Sav. & Trust Co., 314 S.E.2d 166 (W. Va. 1983) (tortious interference with business relationship); Barone v. Barone, 294 S.E.2d 260, 260 (W. Va. 1982). Barone is discussed infra.

The Restatement (Second) of Torts identifies the tort of "intentional interference with inheritance or gift" as one form of the tort based on wrongful interference with an expectancy. Restatement (Second) of Torts § 774B (1977). This Section comprises all of Chapter 37A, "Interference With Other Forms Of Advantageous Economic Relations," which is a subpart or addendum to Chapter 37, "Interference With Contract Or Prospective Contractual Relation."

For example, if the tortious conduct consists of using undue influence to procure inter vivos transfers to the tortfeasor, the case may be litigated between the would-be heir and the alleged tortfeasor even during the lifetime of a competent testator, who may not even be a party, a possibility hardly congenial to the property owner's right to dispose of his property as he pleases.

As one commentator states, "[T]he tort can play havoc with traditional probate law." Fassold, supra note 5, at 30.

As Evans states, "An initial proposition is that only probate courts have jurisdiction to probate wills and that a probate decree, like other judgments and decrees, is not subject to collateral attack." Evans, supra note 6, at 188.
jurisdiction to determine whether a particular document is the testator’s will,\(^{36}\) whether the testator had testamentary capacity,\(^ {37}\) and otherwise to impeach or establish a will.\(^ {38}\)

The tort remedy permits a court of general jurisdiction to render judgments that redistribute estate assets and undermine the finality of probated wills, albeit in substance if not in form. For example, the tort case may determine that a person was wrongly deprived of a bequest because the probated will was the product of undue influence, or that the true will was never probated because it was tortiously destroyed or suppressed, thus effectively “impeaching” the will, regardless of whether these arguments were made before the probate court. Alternatively or in addition, the tort case may determine the testator’s true intentions (to benefit the plaintiff), effectively “establishing” a different will than the probated document. A successful tort claim will involve a finding that a person’s rightful inheritance was interfered with, and a judgment requiring the tortfeasor to make the plaintiff whole. Furthermore, it will require the determination of the deceased testator’s intentions. If the tortfeasor was a taker under the will or intestacy, the judgment as a practical matter will probably come out of the inheritance, effectively redistributing estate assets. In these ways and others, a common law court that recognizes the tort may in effect invalidate or modify a probated will, or establish the will of a decedent already adjudicated to have died intestate.\(^ {39}\)

The existence of a common law tort remedy also threatens the integrity of the probate system at the procedural level. Probate law requirements for proving a testamentary disposition, including, for example, multiple witnesses, are non-existent in courts of general civil jurisdiction, which require plaintiffs to prove the elements of a tort – including the existence of the expectancy itself – by a simple preponderance of the evidence. Validating the tort seems to require or allow the court to second-guess a competent testator, and often in doing so, to rely on the testimony of a very interested third party. In addition, modern probate statutes of limitations for will contests are typically around a year, much shorter than the corresponding tort statutes.\(^ {40}\) These relatively relaxed tort pro-

\(^{36}\) See, e.g., Smith v. Mustian, 234 S.E.2d 292, 296 (Va. 1977). This is the issue known as "devisavit vel non."

\(^{37}\) Id.

\(^{38}\) Guilfoil v. Hayes, 86 F.2d 544, 545-46 (4th Cir. 1936) (claim brought to impeach or establish a will is within exclusive probate court jurisdiction and subject to "probate exception" to federal diversity jurisdiction).

\(^{39}\) For a case from the Third Circuit barring the tort claim when not preceded by a will contest on the basis that "such a tort action offends the probate code by seeking in effect the revocation of an accepted will and the probate of a rejected will," see Moore v. Graybeal, 843 F.2d 706, 710 (3d Cir. 1988) (cited in Reaves, supra note 6, at n.27).

\(^{40}\) MD. CODE ANN., EST. & TRUSTS § 5-207 (2001) (petition to caveat must be filed within six months of the appointment of a personal representative); N.C. GEN. STAT. § 31-32 (2000) (three-year statute of limitations for filing caveat to a will); S.C. CODE ANN. § 62-3-401 (2000) (six months to file a will contest before probate is conclusive); W. VA. CODE § 41-5-11 (2000)}
cedures are one factor that has led some, though not all, states to require plaintiffs to exhaust probate remedies or demonstrate their inadequacy before maintaining the tort action, or even to bar the remedy altogether.

An action for damages based on tortious interference with expectation of inheritance is sometimes thought of as a common law will contest, and state courts that think of it this way have been understandably reluctant to recognize the tort. However, most states that recognize the tort — and at least one that has not yet done so — see it as a secondary or "back-up" remedy, only to be used when, for whatever reason, the probate court remedy would be inadequate. Such states, when they do recognize the tort, typically require exhaustion of probate court remedies or a demonstration of their inadequacy. Without such safeguards, the tort appears to pose a serious threat to the integrity and self-sufficiency of the probate regime, by allowing a disappointed heir to ignore the probate process (and its time limits) entirely and pursue his inheritance in the form of damages at law. This approach inevitably derogates from the authority of the probate court, either by redistributing estate assets (if the defendant is a taker), a task generally within the exclusive jurisdiction of the probate court by state statute, or by allowing a common law trial court to issue (non-party may file an action in equity to impeach or establish a will within two years from the date of the judgment of the circuit court that has acted upon an appeal from a county commission or from the commission's order if there was no appeal); W. Va. Code § 55-2-12 (2000) (limitations time does not begin until that tort is discovered, or by reasonable diligence should have been discovered by the victim).

Of course, the scope of the action is somewhat wider, encompassing claims based, for example, on wrongfully-procured inter vivos conveyances that deplete the estate. A claim with this basis involves no attack on the will whatsoever.

One commentator distinguishes between those states that "allow the suit as a primary cause of action" and those that "treat the action as a last recourse, allowing the action upon exhaustion of all other means of redress." Marmai, supra note 5, at 299-300. In this Article, I prefer to distinguish between those states that impose an exhaustion requirement (or demonstration of the inadequacy of the probate remedy), and those that do not. Applying Marmai's distinction, North Carolina is a "last recourse" state, while West Virginia appears to be a "primary cause of action" state. Marmai herself identifies North Carolina as a primary cause of action state, but she does not take account of Holt, discussed infra. Id. at n.30.

It is for this reason, among others, that the tort action might appear to constitute an impermissible collateral attack on the probate decree. Evans puts it under the heading, "Attack
a judgment contradicting an unappealed probate court judgment (which lacked the bequest at issue).\textsuperscript{46} It is almost inevitable that a successful tort plaintiff will obtain from the civil court a judgment importantly “inconsistent” with that rendered by the probate court.\textsuperscript{47} The sense in which the tort is or threatens to be an impermissible collateral attack on the probate decree, therefore, cannot simply be defined away.

It is hoped that these reflections make clear that a state’s decision to recognize the tort is more than a minor expansion in its tort scheme. Just as recognition of the tort of interference with prospective economic advantage adjusts the boundaries between tort and contract, the tort of interference with prospective inheritance represents a significant incursion by tort law into traditional probate precincts, and is not to be undertaken lightly.\textsuperscript{48} Nevertheless, the tort meets an otherwise unmet need, an equally significant concern.

upon the Probate Decree” and states: “A serious issue is the question how the remedy in tort for damages to plaintiff’s expectancy is affected by a prior probate decree.” Evans, supra note 6, at 202. In order to avoid the undesirable result of the tort-as-collateral-attack, Evans divides the cases into those in which “a remedy is provisionally available both in the probate court and in a law or equity court, [where] the former is to be preferred,” and those in which the probate action will fail “because of the destruction of evidence by the defendant,” in which case the tort “remedy constitutes no attack upon the probate decree.” Id. at 202-04. Though this approach is appealing, it is incomplete. It is not at all clear why the subsequent tort action is not an attack upon the probate decree where the only probatable will was probated (even if the testator might have intended something else). If the probate court finds that the testator died intestate, because the proffered will was procured by undue influence and there is no other will, a tort action that has the effect of transferring assets to someone who is not an intestate heir is clearly in substance an attack upon that probate decree. In addition, Evans fails to resolve whether the tort action is an impermissible collateral attack on the probate decree in those situations in which the plaintiff’s inability to prove the bequest in probate court is not due to defendant’s destruction of the evidence. There may not be any evidence, and that, itself, may be the result of the defendant’s wrongdoing (for example, by preventing a will from being executed). This analysis also does not cover the case where the will itself can be probated, but the assets given to the beneficiary have been conveyed \textit{inter vivos} as the result of tortious conduct. Evans also does not address whether a probate remedy is “adequate” even if litigation expenses will reduce the bequest or conduct warranting an award of punitive damages (which the probate court can never award) has occurred.

These concerns provide a possible answer to the question posed by one early commentator: “Is there any objection to allowing the victim an election whether to raise his claim in the probate court or later in a common law court?” Evans, supra note 6, at 188 (citing Joseph Warren, Fraud, Undue Influence and Mistake in Wills, 41 HARV. L. REV. 309, 320-22 (1928)).

As one commentator puts it, “The tort can play havoc with traditional probate law. . . . [Will] [c]ontestants whose evidence would not survive summary judgment [in probate court] may be tempted to throw in a tortious interference claim, lessen the burden of proof, and thereby do an end-run around settled probate law.” Fassold, supra note 5, at 30.

Other “dangers” associated with the tort include judge and jury confusion about “what the decedent would have done, had certain events not occurred”; fraudulent and frivolous claims; and the possibility that estate-planning attorneys may be named as defendants. Id. at 30-31.
III. States Recognizing the Tort – North Carolina and West Virginia

Two states in the Fourth Circuit, North Carolina and West Virginia, recognize the tort of intentional interference with expectation of inheritance. Because neither of them follows the elements set out by the Restatement (Second) of Torts § 774B, the analysis here will not be framed in those terms. Instead, the tort is presented in each court's own words. After reviewing the relevant cases, an analysis will be offered which attempts to identify the elements of the tort as it exists today in North Carolina and West Virginia.

A. North Carolina

North Carolina was one of the first states in the entire United States to recognize this tort. Eighty-five years ago, the North Carolina Supreme Court authorized a common-law remedy (in a state court of general jurisdiction) against one whose tortious conduct results in another being wrongfully deprived of an inheritance. Two later North Carolina Supreme Court cases from the first part of the last century address the tort squarely, and a fourth more recent case indirectly supports it.

In the first case, Dulin v. Bailey, the defendants and others allegedly physically removed a portion of the testator's will including the legacy to the plaintiff. The plaintiff did not attack the will as presented for probate, nor did she attempt to prove up a different will. However, she did allege that such an attempt would have surely failed: "She allege[d] that she d[id] not attempt to set up the second will because the evidence accessible to her would not prove its entire contents." Instead, she filed a tort claim. The North Carolina Supreme Court reversed a lower court's decision granting defendant's demurrer and "nonsuiting" (dismissing) the plaintiff, thereby recognizing the tort. The court acknowledged that "this action seems to be of the first impression in this state, and is doubtless a very unusual one," but was not deterred, relying on older British cases allowing a legatee to obtain damages for spoliation and suppression of a will, particularly where the plaintiff's inability to prove the alternate

49 RESTATEMENT (SECOND) OF TORTS § 774B reads as follows: "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."


51 Id.

52 The opinion does not indicate the family or marital relationships between testator, plaintiff, and defendants, other than that the named defendant and the testator have the same last name (Bailey). The plaintiff, a woman with a different last name, may be a married daughter. Id.

53 Id. The reason for this is that there were an inadequate number of witnesses. Id.

54 Id.
disposition was the result of the defendant's wrongful conduct.\textsuperscript{55} The court was primarily guided by its conviction that a legatee unable to prove up a will (or bequest) should not be left without a remedy:

If she cannot prove the destroyed will because [she was] unable to prove the entire contents thereof, surely she is entitled to recover of the defendants for the wrong they have done her by the conspiracy and destruction of the will, and the measure of her damages will be the legacy of which she has been deprived.\textsuperscript{56}

In validating the tort, the court did not consider, as many more contemporary jurisdictions do, whether an equitable remedy, for example, a constructive trust to the extent of her legacy, would have been available or preferable.\textsuperscript{57}

In the 1936 case of Bohannon v. Wachovia Bank & Trust,\textsuperscript{58} the second North Carolina Supreme Court case on this tort, Ernest Bohannon alleged that two of his female relatives prevented his grandfather from making a will leaving Ernest a large share of his estate.\textsuperscript{59} The case arose from Ernest's attempt to con-

\textsuperscript{55} Id. at 689-90. Hence, this case would fall into the eighth of Professor Warren's nine situations involving fraud, undue influence, and mistake in wills: (1) cases where the probate court has jurisdiction and can do complete justice by refusing probate; (2) cases where claimant has been defrauded of a legacy where the probate court can afford no remedy; (3) cases of express trusts; (4) cases where there was an oral promise to hold in trust; (5) cases where the problem is one of construction; (6) cases of fraudulent revocation and prevention of republication; (7) cases of fraudulent prevention of revocation; (8) cases where the fraud of defendant has created a difficulty respecting proof; (9) cases of forged will defrauding the next of kin. Evans, supra note 6, at 188 (citing Warren, supra note 46). (It appears that some situations might fall into more than one category,) Evans cites Dulin with approval, under the heading, "Inducing the Revocation or Alteration of Wills." Evans, supra note 6, at 195. Evans also discusses Dulin under the heading, "The Suppression and Spoliation of Wills," where he explains,

So, in Dulin v. Bailey, the plaintiff was permitted to prove his right to a legacy in a tort action by only one witness, whereas two are required to prove the contents of a will offered for probate. The plaintiff, in such a case, may prove his own legacy without proof of entire will, though generally to procure probate, proof of the entire contents of a lost will is likely to be required.

Evans, supra note 6, at 198-99.

\textsuperscript{56} Dulin v. Bailey, 90 S.E. 689, 690 (N.C. 1916).

\textsuperscript{57} The availability of a constructive trust remedy is addressed in Johnson v. Stevenson, 152 S.E.2d 214 (N.C. 1967), discussed infra.

\textsuperscript{58} 188 S.E. 390 (N.C. 1936).

\textsuperscript{59} Id. at 393. The plaintiff's last name is Bohannon, and his grandfather, the decedent whose estate is at issue, is also surnamed Bohannon. One defendant is named Maude Bohannon Trotman. The bank named as defendant is executor and trustee of the estate of the other woman, Laura Webb Bohannon. It is unknown whether these women are the plaintiff's sister, mother, sister-and-law, aunt or aunts, or other relatives. This is the sort of case discussed by Evans under the heading, "Frustration of Testamentary Execution," where he says, "Inasmuch as the probate court cannot grant relief where the testator has been prevented from executing a will,
duct pre-filing discovery on Maude Bohannon Trotman. In opposing Ernest’s application to depose her, Maude argued that Ernest was “attempting to maintain this action on grounds not recognized by law as constituting a cause of action” – namely, the claim of tortious interference with his expected inheritance. In recognizing a cause of action, the court explicitly analogized Ernest’s claim to tortious interference with contract and prospective contract, and also looked to Mitchell v. Langley, a Georgia case from 1915 which recognized the tort: “If the plaintiff can recover against the defendant for the malicious and wrongful interference with the making of a contract, we see no good reason why he cannot recover for the malicious and wrongful interference with the making of a will.” The plaintiff alleged that he was the testator’s grandson, and that his grandfather “had formed the fixed intention and settled purpose of providing for [him]” in his estate. He also alleged that the two women “conspired to deprive” him of his share, by prevailing upon the grandfather not to leave the plaintiff “a large share in his estate” by will or trust. Finally, he alleged that “but for” the wrongful acts of the two women, the plan would have been carried out. According to the court, these allegations were sufficient to state a claim for “wrongful interference with the making of a will.” The court noted that the claim may be difficult to prove, but correctly stated that “that does not touch the

the plaintiff would be without remedy if a decree of distribution...were res judicata.” Evans, supra note 6, at 192. Evans discusses Bohannon with approval, saying,

Thus, it is seen that the inquiry in such cases is coming to be not, Was the plaintiff vested with an interest in the property about to be left to him, but rather, Was there a right to have his prospect not interfered with fraudulently which should be protected? There appears to be no adequate reason why the plaintiff should not have alternative remedies, one at law for tort to his expectancy or one in equity to raise a trust.

Id. at 193.

60 Bohannon, 188 S.E. at 390-92. This case took place prior to the institution of modern discovery practices, including mandatory disclosure requirements. However, state law made certain forms of discovery available on the basis of affidavits even before the complaint was filed. Id. at 394.

61 Id. at 392.

62 85 S.E. 1050 (Ga. 1915).

63 Bohannon, 188 S.E. at 393. Puzzlingly, the Supreme Court of North Carolina does not cite Dulin v. Bailey, 90 S.E. 689 (N.C. 1916), its own prior case, in direct support of the tort.

64 Bohannon, 188 S.E. at 394.

65 Id. at 393.

66 Id.

67 Id.

68 Id. at 394.
existence of the cause of action, but only its establishment."

Although the North Carolina Supreme Court did not cite Dulin in support of its recognition of the tort, there is no apparent conflict between the two cases. The primary factual difference is that in Dulin, the tortious conduct consisted of actual physical destruction of part of an executed will favoring the plaintiff, while in Bohannon the conduct involved preventing any such will from coming into being. It seems unlikely this difference would have mattered to the Dulin court, which was guided by the idea that a wronged legatee unable to prove up a bequest in a probate court should not be left without a remedy. It is less clear whether the Bohannon court would have validated Dulin's cause of action, but only because Bohannon focused on interference with the making of a will, an analogy to the making of a contract. Certainly nothing in Bohannon undermines a claim based on physical spoliation, destruction, or suppression of a will. In fact, to the extent that Dulin's expectancy was better established than Bohannon's – a will in her favor was actually executed – it is difficult to imagine that the Bohannon court would not have recognized her claim.

On the basis of Dulin and Bohannon, it appears that the tort is clearly recognized in the state of North Carolina. However, the 1950 case of Holt v. Holt at best considerably limits access to the remedy, and at worst, casts recognition of the tort itself into doubt. In Holt, two disinherited sons filed a tort claim against their brothers, grantees of inter vivos conveyances and devisees under the will of their father. They sought damages from their brothers, who allegedly used fraud or undue influence to induce their father to convey and will his property to them in order to intentionally defraud the disinherited brothers of their rights of inheritance. The disinherited brothers allegedly did not learn of the will until after its admission to probate, and did not learn of the inter vivos conveyances during their father's lifetime. (The opinion does not state whether the disinherited brothers filed a will contest, but in any event, it does not appear that the time to do so had expired.) The North Carolina Supreme Court held that the will could be attacked only by caveat, and that, unless and until the will was declared invalid in a caveat proceeding, the disinherited brothers lacked standing to maintain an action for damages. Read narrowly, this result might be taken simply as imposing an exhaustion requirement on tort plaintiffs, and in order to harmonize it with Dulin and Bohannon, this is the most favored approach.

But what is most difficult about the opinion in Holt – which does not

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69 Id.
70 61 S.E.2d 448 (N.C. 1950).
71 Id. at 450-51.
72 Id. at 450.
73 Id. at 451.
74 Id. at 453.

https://researchrepository.wvu.edu/wvlr/vol104/iss2/4
even mention Dulin or Bohannon, much less distinguish them – is the reasoning, not the result. In Holt, the North Carolina Supreme Court held that the disinherited brothers had to have the will struck down in probate court before maintaining the tort claim, not on an exhaustion or adequacy-of-probate-remedy theory, but on the basis that only in this way can the right to challenge the transfers, which belonged only to the father, descend to them intestate. The opinion is openly hostile to the idea that there is any independent right in the disinherited sons, based on loss of an expectancy, even based on the intentional act of another and after the death of the parent.

At the very least, after Holt, it appears that if there is a will, a successful result at the probate court level is a prerequisite to maintaining a tort claim. This is a significant limitation because those who succeed in probate court may have no damages left to allege in a common law court, while those who fail in an attack by caveat will apparently be barred from proceeding in tort. The tort will not be available precisely where it is needed most. Furthermore, the rationale of Holt clearly suggests that persons who would not inherit (intestate or under a prior will) certain rights of action formerly belonging to the decedent could never maintain the tort, because the “derivative” right to do so would never belong to them.

Holt does seem to allow the tort as the second part of a two-part attack on a will. First, the plaintiff would have the disadvantageous will declared invalid (for example, as procured by undue influence), and then, if necessary, a second proceeding could be brought at common law to establish a bequest he or she could not establish in probate court (for Dulin- or Bohannon-type reasons).

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75 Id. at 452-53 ("[I]f the cause of action still exists in the person making the conveyance at the time of his death, it passes to those who then succeed to his rights. . . . [T]he plaintiffs have no standing to maintain these suits until the probated paper writing is declared invalid as a testamentary instrument by a competent tribunal in a caveat proceeding; for such paper writing wills all rights existing in A.F. Holt, Sr., at the time of his death to the defendants, with the result that nothing descends to the [plaintiffs].").

76 Id. at 451-52 ("In the last analysis, the wrong charged . . . is that of procuring property from the decedent, A.F. Holt, Sr., by fraud or undue influence. As we shall see, this was a wrong against the decedent, and not a wrong against the plaintiffs. Hence the plaintiffs are asserting alleged rights which are essentially derivatives from their ancestor. The significance of this fact must not be obscured in any degree by the allegations of the complaints that the alleged conspirators procured the conveyances from A.F. Holt, Sr., to deprive the plaintiffs of their rights of inheritance as prospective heirs and distributees of their then living ancestor. A child possesses no interest whatever in the property of a living parent. He has a mere intangible hope of succession. . . . In so far as his children are concerned, a parent has an absolute right to dispose of his property by gift or otherwise as he pleases. . . . These things being true, a child has no standing at law or in equity either before or after the death of his parent to attack a conveyance by the parent as being . . . in deprivation of his right of inheritance." (emphasis added)).

77 One commentator suggests as a matter of strategy that “a successful will contestant may be well advised to bring a subsequent action for tortious interference, seeking punitive damages in the amount of the attorney’s fees incurred in the will contest.” Fassold, supra note 5, at 28. If the will contestant had to pay his or her own attorney’s fees, this might work; however, if the
addition, read narrowly, *Holt* is arguably inapplicable if there is no will (for example, cases of intestacy or interference based on preventing a will or on *inter vivos* conveyances alone), or perhaps if there was interference with the right to bring a caveat proceeding (for example, by fraud or threats), as alluded to in *Johnson v. Stevenson*,\(^78\) the last of the North Carolina Supreme Court cases relevant to this tort.

*Johnson*, a 1967 constructive trust case, stands for the proposition that inadequacy of the probate court remedy is a prerequisite to maintaining an action outside the probate court that "changes radically the legal significance and consequences of the judgment or decree of probate."\(^79\) Arguably, therefore, it applies to the tort claim, although indirectly.

In *Johnson*, the daughter of the testator sought to impose a constructive trust on realty devised by her parents to her brother and sister-in-law and their children.\(^80\) She did not attack the will at any time during the seven years then permitted for filing a caveat.\(^81\) Instead, many years later, she filed an equitable action, alleging that the will was the result of undue influence, and sought a constructive trust to the extent of her intestate share.\(^82\) The defendants demurred, and their demurrer was granted, sustained on appeal, and affirmed by the North Carolina Supreme Court.\(^83\) The plaintiff had not only failed to attack the will directly by caveat, she also did not allege that her right to bring such a caveat proceeding "was interfered with in any manner by her brother or his wife or by any other person or circumstance."\(^84\) Taken together, plaintiff's failure to avail herself of a caveat proceeding that could have given her complete relief, and failure to allege interference with her right to do so, proved fatal to her constructive trust claim.\(^85\) *Johnson* thus imposes a requirement either of exhaustion of estate paid, whether the will contestant sustained any damages would depend on the facts. Also, a number of states do not consider the absence of punitive damages as sufficient to demonstrate the inadequacy of the probate court remedy, and thus the tort plaintiff would be unable to plead and prove an essential element of the tort claim. For example, the Missouri court has expressly held that the unavailability of punitive damages in the will contest does not render the probate remedy "inadequate." *McMullin v. Borgers*, 761 S.W.2d 718, 720 (Mo. Ct. App. 1988).

\(^78\) 152 S.E.2d 214 (N.C. 1967).

\(^79\) *Id.* at 217.

\(^80\) *Id.* at 215-16. The brother and sister-in-law received a life estate, with the remainder going to the grandchildren. *Id.* at 215.

\(^81\) *Id.* at 216.

\(^82\) *Id.*

\(^83\) *Id.* at 216, 218.

\(^84\) *Id.* at 218.

\(^85\) *Id.* at 218 ("The grounds on which plaintiff seeks to establish a constructive trust [undue influence] were equally available as grounds for direct attack on the will by Caveat. This right of direct attack by Caveat gave her a full and complete remedy at law. Hence, plaintiff, on the facts alleged, is not entitled to equitable relief.").
probate remedies or demonstration of their inadequacy.\textsuperscript{86} It also suggests that interference with the right to file a direct attack – perhaps by threats or misrepresentation – can either fulfill the requirement or relieve the plaintiff of the requirement to exhaust probate court remedies.

The results of Johnson are consistent with Dulin or Bohannon, as the plaintiffs in those cases would have been unable to obtain a complete remedy in probate court – in Dulin because of an inadequate number of witnesses, and in Bohannon both because the will benefiting the grandson was never written, and because the grandson was (apparently) not the intestate heir. The difficulty, again, comes in reconciling these cases with Holt. It is unclear in Dulin whether the plaintiff was an intestate heir of the decedent, though it appears she was not, at least not to the extent of her bequest, or she would not have needed to prove it up in order to recover fully. In Bohannon, it is stated that the grandson-plaintiff was not an intestate heir of the decedent. Thus, on the rationale of Holt, neither the Dulin nor the Bohannon plaintiff had standing. Notwithstanding Holt, and perhaps only because Holt does not explicitly repudiate the tort, out-of-state post-Holt cases and authoritative sources continue to count North Carolina among states recognizing the tort.\textsuperscript{87}

What are the elements of the tort in North Carolina? As noted above, neither of the Fourth Circuit states that recognize the tort do so by reference to the Restatement or its specific formulation of the tort. As stated above, the 1916 Dulin court states:

If she cannot prove the destroyed will because [she was] unable to prove the entire contents thereof, surely she is entitled to recovery of the defendants for the wrong they have done her by the conspiracy and destruction of the will, and the measure of her damages will be the legacy of which she has been deprived.\textsuperscript{88}

At this stage, we can say that the tort required at least (1) the existence of an expectancy ("the legacy of which she has been deprived"); (2) conduct resulting in this deprivation ("the wrong they have done her"); and (3) damages. The remedy available from the probate court must also be inadequate ("if she cannot prove the destroyed will . . . surely she is entitled to recovery of the defendants"). It is not clear from Dulin whether the conduct must be intended to deprive the plaintiff of her legacy, or indeed, whether the conduct must be independently tortious. Although the conspiracy and destruction of the will were intentional, the court seemed to place greater emphasis on the position of the plaintiff than on the state of mind of the defendants. Even the accidental destruction of a will

\textsuperscript{86} The Johnson court also discusses the issue of intrinsic versus extrinsic fraud in the context of constructive trust, which is not directly relevant to the tort issue. See id.

\textsuperscript{87} See, e.g., Anderson v. Meadowcroft, 661 A.2d 726, 728 (Md. 1995) (citing Bohannon).

\textsuperscript{88} Dulin v. Bailey, 90 S.E. 689, 690 (N.C. 1916) (citation omitted).
might leave her in this situation, and nothing in *Dulin* rules out a claim under those circumstances.

In *Bohannon*, decided twenty years later, a clearer structure of elements can be discerned. The plaintiff’s adequately-pleaded claim included (1) a valid expectancy (his blood relationship to the testator, and the testator’s "fixed intention and settled purpose of providing for him" in his estate); (2) intentional interference with that expectancy (the defendants “conspired to deprive” him of his share, by prevailing upon the grandfather not to leave the plaintiff “a large share in his estate” by will or trust); (3) independently tortious conduct (the conspiracy); (4) reasonable certainty that absent the tortious interference the plaintiff would have received the expectancy (“but for” the wrongful acts of the defendant, the testator’s plan would have been carried out); and (5) damages (the “large share” of the estate).

With respect to the first element, one commentator on the tort in general suggests that “[t]he clearest proof of an expectancy is an earlier will,” although “[a] draft or a testator’s written intention may be sufficient to establish an expectancy,” but North Carolina does not set the standard so high. Although the plaintiff in *Dulin* was a beneficiary under an earlier will, it does not appear that the expectancy in *Bohannon* ever went beyond “a fixed intention and settled purpose” — *i.e.*, it was never reduced to writing. The same commentator suggests that in theory “a long-estranged son or daughter could establish expectancy based solely on the parent-child relationship,” but under *Holt*, a valid expectancy in North Carolina must consist of more than mere status as the potential intestate heir of a testate decedent.

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89 Bohannon v. Wachovia Bank & Trust, 188 S.E. 390, 393 (N.C. 1936).
90 Id.
91 "Typical intentional torts include assault, battery, slander, libel, defamation, trespass, conversion, forgery, alteration, suppression of a will, fraud, duress, undue influence, and abuse of fiduciary duty or confidential relationship. The plaintiff must allege at least one of these types of conduct; recklessness or negligence are not enough." Shirley, *supra* note 5, at 18.
92 *Bohannon*, 188 S.E. at 393.
93 Id.
94 The closest any of one of the North Carolina cases comes to the issue of precisely how damages are to be measured is *Dulin*, which describes it as “the legacy of which she has been deprived.” 90 S.E. at 690. None contemplate whether, for example, the legacy should be “discounted” by the probability that the testator would have disinherited the plaintiff even absent the interference, as suggested by Driscoll, *supra* note 5, at 540.
95 Fassold, *supra* note 5, at 27.
96 *Id.* (referring to Arizona’s intestacy statutes).
97 61 S.E.2d at 451-52. To this extent, North Carolina diverges from states like Georgia and Illinois that find an expectancy “if an intending donor or testator has actually taken steps toward perfecting the gift, devise, or bequest, so that if left alone the interest will cease to be inchoate and become a perfected benefit.” Reaves, *supra* note 5, at 564. *Bohannon* would not meet this standard.
Although Dulín is more explicit on this point than Bohannon, taken together with Johnson, these cases clearly indicate that North Carolina requires that a will contest not be an adequate remedy before allowing a plaintiff to maintain the tort (or obtain an equitable remedy).\(^9\) Unfortunately, no case provides a clear standard of adequacy or inadequacy.\(^9\) Put another way, the specific rationales offered by the Dulín and Bohannon courts in support of the tort would not apply to a plaintiff who could bring a caveat proceeding (will contest) and receive his or her legacy in full thereby.\(^10\) To the extent that Holt permits the claim at all, it makes clear that if there is a will to challenge, the would-be tort plaintiff must challenge it, and successfully, before bringing any further common law claim.

Although Dulín and Bohannon attach significance to the plaintiff's inability to prove the bequest in the probate court, neither shows any concern for traditional distinctions between law and equity in recognizing the tort. Neither case considers whether an equitable action seeking a constructive trust would be an acceptable or preferable alternative to the action at law for damages; in fact, neither opinion even mentions whether the tortfeasor-interferers were beneficiaries of the estate at issue (and hence whether a constructive trust remedy would be suitable). Nor does either case display any concern with whether recognition of the tort will inappropriately extend the legal remedies available for this wrong

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\(^9\) Although there is an A.L.R. annotation on the topic, “Action For Tortious Interference With Bequest As Precluded By Will Contest Remedy,” it does not mention any North Carolina cases, or indeed, any cases from states in the Fourth Circuit. See Blum, supra note 29.

\(^9\) By contrast, for example, the Missouri court has expressly held that the unavailability of punitive damages in the will contest does not render the probate remedy “inadequate.” Reaves, supra note 5, at 565 (citing McMullin v. Borgers, 761 S.W.2d 718, 720 (Mo. Ct. App. 1988)). In addition, a subsequent action for punitive damages or litigation expenses is also barred. Id. (citing Smith v. Chatfield, 797 S.W.2d 508, 510 (Mo. Ct. App. 1990)). Hence, the advice of one commentator “to bring a subsequent action for tortious interference, seeking punitive damages in the amount of the attorney's fees incurred in the will contest,” Fassold, supra note 5, at 29, will not work in Missouri. (But see his later remark: “Punitive damages are generally not available in a will contest. This unavailability does not itself constitute inadequate relief, such that a contestant would be permitted automatically to bring a tort action in which such damages are sought.” Id. at 29.) It is unclear whether it would work in North Carolina. In Missouri, inadequacy of the probate remedy will be found where “plaintiff could not discover the fraudulent suppression of a valid will until the probate period had run, plaintiff was unable to establish a maliciously destroyed will in probate, or defendant tortiously induced an inter vivos transfer of assets that would have passed to plaintiff under a will.” Reaves, supra note 5, at 566 (citing Wilburn v. Meyer, 329 S.W.2d 228 (Mo. Ct. App. 1959) and McMullin, 761 S.W.2d at 720). Under Missouri law, Dulín would clearly be allowed as falling into the second category above, but Bohannon is less clear.

\(^10\) One commentator identifies four reasons for imposing an exhaustion requirement: (1) the plaintiff sustains no harm when a lost, destroyed or suppressed will is entered into probate; (2) because probate courts have exclusive jurisdiction to probate wills, a plaintiff must seek a remedy there first; (3) the tort action is “a collateral attack on the probate decree”; and (4) “permitting the primary tort action contravenes public policy” which requires that the will of every deceased person be offered for probate if it exists. Marmai, supra note 5, at 303-05. Clearly these reasons are closely related to one another.
beyond those traditionally available in equity or the probate court itself.

B. West Virginia

West Virginia recognizes the tort and permits broad access to it. It also appears that timely cases based exclusively on *inter vivos* transfers are permitted. In the 1982 case of *Barone v. Barone*, the West Virginia Supreme Court of Appeals found "tortious interference with a testamentary bequest to be a tort in West Virginia." In *Barone*, a dispute arose among siblings regarding the estate of their father, whose will had been probated more than three years before. One sister counter- and cross-claimed against her brothers, on the basis of evidence that emerged during the underlying lawsuit that one of her brothers, an attorney, had changed the father’s will, executed on his deathbed, thereby depriving her of her share "contrary to their father’s wishes." She alleged that the probated will was procured by undue influence, and also alleged fraud. The trial court dismissed her claim as a "collateral attack on a duly probated will," brought after the two-year probate contest statute of limitations had expired.

The Supreme Court of Appeals reversed on the basis that the sister "was not trying to impeach or establish a will, but was complaining about a tortious injury and also alleging equitable fraud – causes that could not even be heard in the probate proceedings. Therefore, the probate contest statute of limitations did not apply." Why could the sister’s claims “not even be heard” in probate court? According to the court,

Equitable fraud actions are not strictly within probate court jurisdiction that is statutorily established and limited to 'ascertain[ing] whether, and if any, how much, of what was so offered for probate, be the will of the decedent.' The only issue determinable in a probate court is devisavit vel non, to decide the mechanical integrity of an instrument purporting to be a will.

The court applied the same reasoning to the sister’s tortious interference claim (based on undue influence):

101 294 S.E.2d 260 (W. Va. 1982).
102 Id. at 264.
103 Id. at 261.
104 Id.; see also Calacino v. McCutcheon, 356 S.E.2d 23, 26 (W. Va. 1987).
105 Barone, 294 S.E.2d at 261.
107 Barone, 294 S.E.2d at 262.
108 Id. at 263. (quoting W. VA. CODE § 41-5-11) (footnotes and citations omitted).
This tort is not within probate court jurisdiction . . . (see argument, supra), and Code 41-5-11’s time limits are inapplicable. Code 55-2-12 covers the limitations time, and its count does not begin until that tort is discovered or, by reasonable diligence should have been discovered by the victim.\(^{109}\)

This decision allows very broad access to the tort remedy. Later cases analogize this tort to other “interference” torts rather than considering it as a supplement or threat to the probate scheme.\(^{110}\) Even after probate is closed, and no contest was brought, it appears that a plaintiff may allege the tort based on a claim that could have been heard by the probate court, such as that the will was procured by undue influence. To reach this conclusion, the court took an extremely formalistic approach. The sister presented no will, nor did she formally seek to “impeach” the will probated years before; she did not seek to have the entire will stricken and the testator declared intestate, although she sought revocation of the bequests to her brothers. In that sense, it is accurate to say that the sister was not asking the court to “establish” a will, or any particular provisions of a will.

Nevertheless, if her tort suit succeeded on remand (or her equitable fraud suit, for that matter), her lost bequest would be restored to her (by making her brother or brothers liable to her for that amount), in that sense “revoking” the bequests to them, and the distribution of the estate would be altered without conforming to will formalities (for example, multiple witnesses). In substance, she was surely impeaching the will her brother drafted and attempting to establish an alternative testamentary scheme. But because she was doing so in the form of an independent tort, she was allowed to proceed years after the close of probate. The court did not even discuss whether “by reasonable diligence” she could have discovered the draftsman’s fraud in time to contest the will. She was simply permitted to bring the tort suit, notwithstanding her failure to contest the probate of the will when she had the chance.\(^{111}\)

A later case indirectly extends the tort to inter vivos transfers, making

\(^{109}\) Id. at 264.

\(^{110}\) In Torbett v. Wheeling Dollar Sav. & Trust Co., 314 S.E.2d 166 (W. Va. 1983), the West Virginia Supreme Court of Appeals recognized the tort of interference with prospective employment or business relations by restrictive employment contract, and stated, “We have recognized tortious interference with business interests, with contractual relations, and with a testamentary bequest.” Id. at 171 (citations omitted). In Kessel v. Leavitt, 511 S.E.2d 720 (W. Va. 1998), tortious interference with expectation of inheritance is classed along with other “interference” torts, such as interference with an employment relationship and interference with a contractual relationship, in the court’s discussion of whether a tort of interference with parental or custodial relationship is simply “a logical progression of this jurisdiction’s pre-existing tortious interference law.” Id. at 763.

\(^{111}\) Contrast, for example, North Carolina law, where, under Holt, discussed supra, such a suit could not be maintained.
clear that the tort statute of limitations begins to run at the later of the time of transfer or the time the plaintiff became aware of it. In the 1987 case of Calacino v. McCutcheon, the West Virginia Supreme Court of Appeals declined to make the tort available to plaintiffs seeking to rescind an *inter vivos* transfer made seven years before the death of the donor and also seeking damages for tortious interference, where the plaintiffs were aware of the transfer at the time and did not file a claim until long after the two-year tort statute of limitations had expired. This suggests, at least, that a timely tort claim based exclusively on *inter vivos* transfers would be permitted.

In Barone, the West Virginia Supreme Court of Appeals did not identify the specific elements of the tort, beyond analogizing it to interference with business interests and interference with contractual relations. The court cited the cases of a number of other jurisdictions with approval (Florida, Georgia, Iowa, Maine, Massachusetts, New Jersey, and Ohio). Although these jurisdictions did not analyze the tort identically, most adhered to the five-part formulation set out above in *Bohannon*. West Virginia does not impose any exhaustion requirement, and *Calacino* seems to permit a timely tort claim based solely on *inter vivos* conveyances.

IV. STATES NOT RECOGNIZING THE TORT – MARYLAND, SOUTH CAROLINA, AND VIRGINIA

A. Maryland

Although the Maryland courts seems sympathetic to the tort in principle, none has yet encountered a factual situation warranting relief, and all have so far declined to recognize it. Maryland's highest court, the Maryland

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113 *Id.* at 26.
114 294 S.E.2d at 264.
115 *Id.*
116 A federal district court in Maryland recently seemed open to the possibility that the state might recognize the tort. "Insofar as plaintiff bases his state law claims on tortious interference with economic advantage, it is conceivable than an individual who so interferes with a prospective inheritance could be liable in tort." Conboy v. Norwest Bank Indiana, N.A., No. Civ. S 94-1851, 1994 WL 621605 (D. Md. July 13, 1994) (citing W. PAGE KEETON, ET AL., PROSSER AND KEETON ON TORTS 1007-08 (W. Page Keeton et al. eds., 5th ed. 1984)). It appears that the plaintiff made allegations that a niece of the testator and a church unduly influenced the testator in such a way as to deprive him of his inheritance. *Id.* at *1. However, the plaintiff did not sue the niece or the church, but only the personal representative and trustee of the estate, and "[u]nder no principle of law known to this Court is the present defendant, as personal representative or trustee, 'ultimately liable,' to use plaintiff's allegation, for such tortious conduct." *Id.* Perhaps had Conboy sued the appropriate defendants, the Maryland federal court would have had to address the issue, and perhaps certify the question to the Maryland Supreme Court. But he did not.
Court of Appeals, has not yet answered the issue. The claim of the plaintiff in the first Maryland appellate case addressing the tort, Anderson v. Meadowcroft,\(^\text{117}\) failed because the plaintiff alleged just six of the seven elements of undue influence under Maryland law. The court therefore did not need to reach the issue of whether the tort was recognized. The second Maryland case, Geduldig v. Posner,\(^\text{118}\) failed essentially because the tort claim duplicated a straightforward (and concurrent) will contest based on undue influence. As the Geduldig court stated,

[T]he Court of Appeals would recognize the tort if it were necessary to afford complete, but traditional, relief . . . where the traditional remedy [a will contest or an equitable action for constructive trust] might be insufficient to correct the pecuniary loss. The question of viability and application of the tort depends on the facts in a given case.\(^\text{119}\)

Hence, in Maryland, recognition of the tort seems merely to await a proper set of facts, perhaps one involving dissipation of estate assets intended for a beneficiary who is not an intestate heir.

The Maryland Court of Appeals first addressed the tort in 1995, in Anderson v. Meadowcroft.\(^\text{120}\) Paul Meadowcroft died in November, 1987.\(^\text{121}\) His probated will left most of his estate to his cousin, Francis, rather than his three surviving brothers.\(^\text{122}\) The brothers filed, then dismissed, a caveat proceeding.\(^\text{123}\) In October, 1993, long after Maryland’s six-month statute of limitations on caveat proceedings had expired in June of 1988, someone named Maxine Anderson filed a complaint alleging that Francis tortiously interfered with her expected inheritance.\(^\text{124}\) She alleged that she was Meadowcroft’s daughter and his beneficiary under a 1975 will.\(^\text{125}\) She also alleged that Francis, an attorney, engaged in undue influence, coercion, and persuasion to induce Meadowcroft to change his will, and that Francis himself drafted it.\(^\text{126}\) Maxine’s first complaint

\(^{117}\) 661 A.2d 726 (Md. 1995).
\(^{119}\) Id. at 257.
\(^{120}\) 661 A.2d 726 (Md. 1995).
\(^{121}\) Id. at 726.
\(^{122}\) Id.
\(^{123}\) Id.
\(^{124}\) Id. at 726-27.
\(^{125}\) Id.
\(^{126}\) Id. at 727.
alleged conversion and fraud; and on appeal after a dismissal, Maxine reframed the case to "draw... into question whether interference with an expected inheritance and fraud in the procurement of a will are viable causes of action in Maryland."\(^{128}\)

In setting the stage to answer this question as it pertains to tortious interference (as distinct from fraud), the Maryland court first recited the Restatement § 774B formulation of the tort.\(^{129}\) The court acknowledged that many jurisdictions recognize the tort, including Maryland's sister states in the Fourth Circuit, North Carolina and West Virginia, as well as Georgia, Iowa, Maine, Massachusetts, Missouri, New Mexico, Ohio, and Texas.\(^{130}\) The court also noted that many of these states require the plaintiff to exhaust probate proceedings or demonstrate their inadequacy.\(^{131}\) Finally, the court stated that in 1994 Maryland "adopted the tort of wrongful or malicious interference with economic relations."\(^{132}\) In discussing both Restatement § 774B and Maryland's tort of interference with economic relations, the court stressed the element of "conduct tortious in itself," also described as conduct that is "independently wrongful or unlawful."\(^{133}\)

Before \textit{Anderson}, Maryland had "not yet considered expanding the tort to apply to interference with gifts or bequests, nor...the compatibility of such an expansion with caveat proceedings."\(^{134}\) Unfortunately, even after its careful exposition of the tort, the court did not reach these issues, "because [it held] that the complaint [did] not adequately allege undue influence, which forms the basis" of the claim.\(^{135}\)

Specifically, Maxine failed to allege "facts sufficient to establish the decedent's high susceptibility to undue influence," the seventh element of undue influence under Maryland law, either by alleging his medical or mental condition, the use of force or fear, or any facts supporting the claim of "coercion."\(^{136}\) On this basis, the Court of Appeals affirmed the trial court's dismissal of her

\(^{127}\) \textit{Id.}

\(^{128}\) \textit{Id.} at 727-728.

\(^{129}\) \textit{Id.} at 728.

\(^{130}\) \textit{Id.}

\(^{131}\) \textit{Id.}

\(^{132}\) \textit{Id.} at 728-29.

\(^{133}\) \textit{Id.}

\(^{134}\) \textit{Id.}

\(^{135}\) \textit{Id.} at 730.

\(^{136}\) \textit{Id.} at 731-32. However, she did allege five or six of the seven elements of undue influence under Maryland law, namely, a confidential relationship between Francis and Meadowcroft, a substantial benefit to Francis, Francis' involvement in the drafting of the will, an opportunity to exert influence, a change from a former will, and "possibly an unnatural disposition." \textit{Id.}
case.137

_Geduldig v. Posner,_138 the second case, is factually more convoluted, but the legal result is similar. Rose Posner was the wealthy widowed mother of three adult children, David, Judith, and Carol. Between 1985 and 1996 she executed at least ten separate wills and codicils, making a variety of contradictory dispositions. When our story begins, Rose had been estranged from her daughter Judith since 1975.139 Rose's 1985 will bequeathed just one hundred dollars to Judith (and the same amount to each of Judith's surviving children), dividing the residue of her sizeable estate between David and Carol.140 Later that same year, she executed a codicil purporting to exercise a power of appointment over marital trust assets created in her late husband's will, giving half to David and half to Carol.141 She also made _inter vivos_ gifts of $750,000 each to David and Carol.142

In 1990, she executed the first in a series of wills more and more favorable to David, and drafted by Mark Willen, David’s long-time attorney.143 When

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138 743 A.2d 247.

139 _Id._ at 250-51, 254-55 ("There is evidence indicating . . . that they spoke only once from 1975 to 1994.").

140 _Id._ at 249.

141 _Id._ As described below, it was later adjudicated that her husband’s will did not give her a testamentary power of appointment, and those assets were divided between the three children equally. _See infra_ note 142.

142 _Id._ In 1986, she executed a will which made the same disposition as the 1985 will and codicil taken together. _Id._ at 249-50.

143 _Id._ at 250-51. The 1990 will gave one hundred dollars to Judith and each of her surviving children, put $1 million in trust for David’s children, and gave half the residuary estate to David outright. The other half was placed in trust, with David as trustee. Carol would receive the trust income for life, and David’s children would receive the principal at Carol’s death. _Id._ at 250. Strictly speaking, the residuary estate went half to David, half to David as trustee for Carol. During 1993-94, Rose’s health began a serious decline. _Id._ After a family reconciliation in 1994, engineered by Rose’s brother, a physician, Rose executed the first of several wills dividing the residue of her estate and the marital trust assets equally among all three children. _Id._ at 250-51, 254-55. In April, 1994, she executed a codicil to the 1990 will, bequeathing the residuary estate, including the marital trust assets, to the three children equally. _Id._ at 250-51. Another “first codicil” to the 1990 will was prepared by Willen, although never executed, which divided the assets into three equal shares but made a similar trust arrangement as the 1990 will. _Id._ at 251. On May 8, 1994, Rose executed a will, prepared by Willen, that revoked the 1994 will and codicil, and republished the 1990 will. _Id._ at 251-52. On May 11, she executed yet another will prepared by Willen, creating a $1 million trust fund for David’s children, appointing the marital trust assets to the children equally, and bequeathing the residuary estate to the three children equally, but providing that if Judith or Carol predeceased Rose, their shares would go to David’s children in trust, with David as trustee. At this time the siblings began litigating about whether Rose would remain in Devon Manor, the nursing home where she had resided since February, 1994. _Id._ at 251-52. On May 12, Rose’s physician-brother, Judith, and Carol obtained a temporary restraining order (TRO) preventing David and his wife from removing Rose from the nursing home. _Id._ On May 16, Rose executed a will disposing of
she died in October, 1996, Rose left an estate worth in excess of six million dollars.\(^1\) Her last will, executed in January, 1996, and re-executed in March, 1996,\(^2\) set up a residuary trust with David as trustee.\(^3\) The bulk of her assets went to the trust, which left $2.5 million to charity, $2.58 million to David and his wife, one million dollars in trust for David’s children, $100,000 to Rose’s sister, and one hundred dollars each to her daughters Judith and Carol.\(^4\) Perhaps unsurprisingly, Judith and Carol sued. The sisters succeeded in having the marital trust assets from their father’s estate distributed in three equal shares, as their father’s will had provided.\(^5\) The sisters also filed a caveat petition, alleging that the 1996 will was the product of undue influence and fraud.\(^6\) The sisters filed a separate suit against David (and his wife and children), alleging fraud and undue influence, as well as an independent claims for tortious interference with their expected inheritance (by means of fraud and undue influence), and sought compensatory and punitive damages as well as a constructive trust over the trust assets.\(^7\) In 1998, the cases were consolidated.\(^8\)

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\(^{144}\) Id. at 248-49.

\(^{145}\) The execution and re-execution were also videotaped. Id. at 254-55.

\(^{146}\) Id. at 248-49.

\(^{147}\) Id.

\(^{148}\) Id. (citing Posner v. McDonagh, No. 1574, September Term, 1997 (filed March 11, 1999)). Specifically, the sisters successfully argued that their mother did not have a testamentary power of appointment over the marital trust. The opinion does not indicate what portion of the assets this covers.

\(^{149}\) Id. at 248-49.

\(^{150}\) Id. at 249.
David moved for summary judgment on three bases: (1) there was no evidence of undue influence and fraud because there was no evidence of force or coercion, (2) tortious interference with expected inheritance is not recognized as a tort in Maryland, and (3) there was no evidence of expectation of an inheritance.\textsuperscript{152} The trial court found that there was no evidence of undue influence, because there was no evidence that Rose was susceptible to any influence or false statement, nor was there any evidence that any fraudulent statements affected the estate plan.\textsuperscript{153} As a result, the trial court did not specifically reach the viability of the tort claim.\textsuperscript{154}

The Maryland Court of Special Appeals reversed and remanded, finding that “[t]he totality of the evidence, while largely circumstantial, is sufficient to create a triable issue of fact” on the fraud and undue influence claims as these relate to the admission of the 1996 will itself (the caveat petition).\textsuperscript{155} Although the trial court had not addressed the tort claim, “for the benefit of the court on remand,”\textsuperscript{156} the court addressed “whether Maryland recognizes the tort of intentional interference with expected inheritance,” and concluded “that the tort is not available on the facts” of this case.\textsuperscript{157}

In its analysis, the \textit{Geduldig} court gave painstaking attention to the issue of remedies, in the context of the historical distinction between legal and equitable actions. The court began by noting that the Restatement formulation of the tort at § 774B does not specifically identify the damages recoverable, but refers to § 774A, the damages section for the tort of interference with contract or prospective economic relation.\textsuperscript{158} Under § 774A, the plaintiff can recover consequential damages, emotional distress or actual harm to reputation if it can reasonably be expected to result from the interference, and, in appropriate circumstances, punitive damages.\textsuperscript{159} In this respect, the tort is a typical action at law like other torts.

The court then noted that “[t]raditionally, claims attacking the distribution of estate and trust assets based on undue influence and fraud were equitable

\textsuperscript{151} \textit{Id.}
\textsuperscript{152} \textit{Id.}
\textsuperscript{153} \textit{Id.}
\textsuperscript{154} \textit{Id.} at 255. Neither the trial court nor the appellate court addressed whether the sisters had pleaded an adequate expectancy, David’s third basis for summary judgment. However, as they are takers under a number of prior wills, as well as intestate heirs, it appears that in every jurisdiction that recognizes the tort at all, this element would be satisfied. \textit{See}, e.g., Dulin v. Bailey, 90 S.E. 689 (N.C. 1916).
\textsuperscript{155} \textit{Geduldig}, 743 A.2d at 259-60 (undue influence), 261 (fraud).
\textsuperscript{156} \textit{Id.} at 248.
\textsuperscript{157} \textit{Id.}
\textsuperscript{158} \textit{Id.} at 256.
\textsuperscript{159} \textit{Id.}
actions,\textsuperscript{160} for which pecuniary relief was available only when necessary to give complete relief – for example, when assets had been dissipated.\textsuperscript{161} Otherwise, the equity court used “traditional equitable remedies such as rescission, specific performance, injunctive relief, constructive trusts, and the like.”\textsuperscript{162} Punitive and compensatory damages (for emotional distress or harm to reputation) are not available in equity.\textsuperscript{163} The goal of an equitable action to set aside a will or trust is to carry out the intent of the testator when it has been frustrated, not to compensate a would-be beneficiary.\textsuperscript{164}

Although in many modern jurisdictions, the distinctions between tort and contract, and between law and equity, have begun to fade away, Maryland courts continue to hold the line. Just as a Maryland court refused to “preside over the death of contract by recognizing as a tort a breach of contract that was found to be in bad faith,”\textsuperscript{165} and refused to “preside over the death of equity” by permitting a “generic cause of action at law for breach of fiduciary duty” (which would make a jury trial available for a claim by beneficiaries against trustees, traditionally an equitable action),\textsuperscript{166} the Geduldig court refused to, as it were, “preside over the death of probate” by allowing an action at law, including punitive damages, when a claim in probate or equity court that the will was procured by undue influence or fraud will “afford complete, but traditional, relief” – namely, the carrying out of the will of the testator.\textsuperscript{167} Because the sisters’ “claims under the tort counts are duplicative of the independent [caveat] claims based on fraud and undue influence,” the court declined to recognize the tort.

After Geduldig, it does seem that a proper case might win the Maryland court’s approval. For example, under the facts of Bohannon, where the tort plaintiff was neither an intestate heir nor a beneficiary under a prior instrument (or if there were no will at all), a traditional caveat proceeding (will contest) would not provide relief, even considered from the decedent’s point of view, as Geduldig directs.\textsuperscript{168} In addition, if the assets have been dissipated or passed into the hands of someone other than the tortfeasor, a constructive trust remedy may not be available or appropriate.\textsuperscript{169} Another situation favorable to recognition of

\textsuperscript{160} \textit{Id.}  
\textsuperscript{161} \textit{Id.} at 256-57.  
\textsuperscript{162} \textit{Id.}  
\textsuperscript{163} \textit{Id.}  
\textsuperscript{164} \textit{Id.}  
\textsuperscript{165} Geduldig, 743 A.2d at 257 (quoting K&K Mgmt., Inc. v. Lee, 557 A.2d 965, 980-81 (Md. 1989)).  
\textsuperscript{166} \textit{Id.} at 256-57 (quoting Kann v. Kann, 690 A.2d 509 (Md. 1997)).  
\textsuperscript{167} Geduldig, 743 A.2d at 257-58.  
\textsuperscript{168} \textit{Id.}  
\textsuperscript{169} Many courts will not impose a constructive trust on an “innocent” party.
the tort might arise if evidence of the tortious conduct is not discovered until long after the close of probate, by which time the estate assets have been distributed and possibly consumed. In these situations, it appears that the Maryland court might acknowledge the usefulness and necessity of the legal tort remedy.

In both Anderson and Geduldig, caveat proceedings were filed, so it is not clear whether the Maryland court would allow a plaintiff to dispense with this step.\(^{170}\) The crucial question appears to be whether a will contest would provide an adequate remedy; if so, a caveat proceeding would not be a prerequisite to the tort suit, but a necessary substitute for it.

**B. South Carolina**

As of 1999, "South Carolina has apparently never recognized a claim for interference with inheritance rights," and the unusual and unhappy facts of Douglass v. Boyce did not persuade the Court of Appeals of South Carolina to take this step.\(^{171}\) On appeal, the South Carolina Supreme Court affirmed, stating: "We have not adopted the tort of intentional interference with inheritance, however, we need not decide whether to recognize this cause of action here."\(^{172}\) Douglass does not present the familiar pattern of resentful children fighting their young stepmother or feuding siblings at war. Frankly, the facts sound more like a TV "movie of the week" set in a small Southern town. William, the child plaintiff is the son of the former Melodye Shampine, a teacher's aide married to Robert Douglass.\(^{173}\) Christopher Boyce, the boy's alleged biological father, was a teenaged "special needs" student in Melodye's class who was killed in a car accident while William was still a baby.\(^{174}\) During Melodye's pregnancy, but before William's birth, Robert sued for divorce, on the grounds of adultery.\(^{175}\) However, the child's paternity was never adjudicated, and under state law, his legitimacy as Robert's child was established conclusively.\(^{176}\) Boyce's family

\(^{170}\) Anderson v. Meadowcroft, 661 A.2d at 726-27. The caveat proceeding was filed by the decedent's three brothers, and later dismissed. The plaintiff in the tort case was not a party to caveat proceeding. *Id.* at 727.

\(^{171}\) Douglass v. Boyce, 519 S.E.2d 802, aff'd, 542 S.E.2d 715 (S.C. 2001). In the early case of Bemis v. Waters, 170 S.E. 475 (S.C. 1933), the Supreme Court of South Carolina declined to recognize a cause of action for damages based on an inter vivos conveyance of real estate, allegedly procured by the donee's undue influence, in deprivation of the right of the donee's siblings to inherit that real estate. *Id.* at 477. The analysis turned on whether the cause of action survived the death of the testator. *Id.* at 476-77.

\(^{172}\) *Douglass*, 542 S.E.2d at 715, 717.

\(^{173}\) *Id.* at 804.

\(^{174}\) *Id.*

\(^{175}\) *Id.*

\(^{176}\) *Id.* at 805. South Carolina, like most states, has a strong though rebuttable presumption that a child born to a married woman is the child of her husband, unless a paternity action proves otherwise. *Id.* at 805 (citing Lewter v. Thompson, 315 S.E.2d 821 (S.C. Ct. App. 1984)).
brought a wrongful death suit based on the car accident, but William was not named as a beneficiary and he did not receive any part of the settlement.\textsuperscript{177} In \textit{Douglass}, William’s lawyer, on William’s behalf, sued the attorneys who represented Boyce’s estate in the wrongful death suit.\textsuperscript{178}

William argued that these attorneys intentionally interfered with his inheritance rights from Boyce by failing to include him as a beneficiary.\textsuperscript{179} The trial court held that William had failed to state a claim, and the appellate court affirmed, holding,

Even if such a claim [intentional interference with inheritance rights] were cognizable, it also fails . . . because there is no allegation that these attorneys were acting for their own personal benefit outside the scope of their representation, or that they had any independent duty to William. William cannot claim that [the attorney defendants] interfered with his inheritance rights by not disregarding his legitimacy and thus stigmatizing him as the illegitimate child of Christopher Boyce.\textsuperscript{180}

William’s claim failed, and the recognition of the tort in South Carolina must await another day (and perhaps a more sympathetic set of facts).\textsuperscript{181}

C. \textit{Virginia}

As of the year 2000, the state of Virginia does not recognize a cause of action for tortious interference with inheritance. The disputants in \textit{Economopoulos v. Kolaitis}\textsuperscript{182} present a familiar pattern: the testator’s three daughters against their only brother, a long-time business associate of their father’s. In 1990, the father had purchased three $200,000 Treasury bills, each titled jointly with a daughter.\textsuperscript{183} In a 1994 codicil to his 1992 will, the father directed the son, as executor, to divide $600,000 of the Treasury bill funds into three shares and pay

\textsuperscript{177} \textit{Douglass}, 519 S.E.2d at 804.

\textsuperscript{178} \textit{Id.} He also sued the divorce attorneys on both sides; these claims were also dismissed. \textit{Id.} at 805.

\textsuperscript{179} \textit{Id.} at 806-07.

\textsuperscript{180} \textit{Id.} at 807.

\textsuperscript{181} In essence, it appears that William’s claim failed because he sued the wrong defendants. The Boyce estate’s wrongful death attorneys neither knew, had reason to know, or had a duty to find out, that William might be his heir. In fact, the only people who arguably interfered with his inheritance rights from Boyce were William’s mother Melodye and her husband Robert, neither of whom sought to have William’s paternity adjudicated while Boyce was still alive. It was their failure to act that prevented him from inheriting.

\textsuperscript{182} 528 S.E.2d 714 (Va. 2000).

\textsuperscript{183} \textit{See id.} at 717.

https://researchrepository.wvu.edu/wvlr/vol104/iss2/4
these shares to each daughter.\textsuperscript{184} However, in the spring of 1996, the father decided to redeem the T-bills, giving $160,000 of the funds to the son and placing another $140,000 into bank accounts that went to son at the father’s death. After this took place, the father executed another will in 1996, dividing his residuary estate equally among all four children, and this will was admitted to probate after his death in 1997.\textsuperscript{185}

The case went to trial in Virginia, but after the close of the daughters’ case-in-chief, “the trial court struck the [daughters’] evidence as to all counts and entered judgment in favor of the [son].”\textsuperscript{186} The Virginia Supreme Court affirmed the trial court’s dismissal of the tortious interference claim. The court stated further,

A person who is mentally competent and not subject to undue influence may make any disposition of his property he chooses during his lifetime or by will at his death. Moreover, the [daughters] had only an expectancy in the Treasury bills while [their father] was alive and in control of them.\textsuperscript{187}

Unfortunately, the Supreme Court’s brief analysis provides little guidance as to whether the court might recognize a claim with better evidence of tortious conduct, or one where the interference was with the testamentary disposition itself, rather than \textit{inter vivos} conveyances. Here, it appears that the daughters were not able to prove that the 1996 will was procured by undue influence, or that undue influence was used to deplete the estate in favor of the son through an \textit{inter vivos} transfer, either of which could support this cause of action in some other states.\textsuperscript{188}

V. Choice of Forum and the “Probate Exception”

Currently, the only reported cases in the five states of the Fourth Circuit addressing tortious interference with expectation of inheritance have been litigated in state court, and the federal jurisdictional issues have therefore not yet been explicitly addressed. Ordinarily, tort claims between diverse parties that also satisfy the statutory amount in controversy may be litigated in either state or federal court.\textsuperscript{189}

However, there are certain exceptions to federal jurisdiction, such that

\begin{itemize}
  \item \textsuperscript{184} \textit{See id.}
  \item \textsuperscript{185} \textit{See id.}
  \item \textsuperscript{186} \textit{Id.}
  \item \textsuperscript{187} \textit{See id.} at 720.
  \item \textsuperscript{188} For example, under West Virginia law as set out in \textit{Calacino, supra}, if the daughters’ challenge to the \textit{inter vivos} transfers was timely, it appears that the action could be maintained.
  \item \textsuperscript{189} \textit{See} 28 U.S.C. \textsection 1332(a) (West 2001).
\end{itemize}
not every case that apparently meets these requirements can in fact be heard in federal court. One of the most significant of these exceptions covers probate matters. Under the so-called "probate exception," a federal court may not "probate a will or administer an estate." The question is whether tortious interference with expectation of inheritance is so closely related to the probate of a will that it is covered by the probate exception, so that federal jurisdiction is lacking, or falls outside it, permitting diversity jurisdiction in a proper case. 

In general, to the extent that the courts of a state recognize the need for the tort, and rely on the inadequacy of the probate court to remedy the injury in question, the federal courts of that state will be likely not to apply the probate exception. Nevertheless, the analyses are not identical, and it is possible in principle for a state to recognize the tort and yet find that federal diversity jurisdiction over it does not exist, relegating the parties exclusively to state court. In addition, the federal courts in a number of states that have not yet recognized the tort have decisional law on the probate exception, which can provide guidance about federal jurisdiction over the tort should it be recognized.

With a proper understanding of the scope of the probate exception in the Fourth Circuit, it is possible to discern the likely results, particularly in North Carolina and West Virginia, the two states that recognize the tort. Naturally, it is more difficult to predict how this issue would be resolved in the states that do not (yet) recognize the tort. However, federal district court probate exception cases from Maryland, South Carolina, and Virginia do provide some guidance.

Some brief background on the probate exception is in order. The historical roots of the probate exception are found in the initial grant of jurisdiction to the federal courts of the United States in the Judiciary Act of 1798. In England at that time, there existed a tripartite judicial system: courts of law, chancery (equity) courts, and Ecclesiastical (Church) courts. Simplifying greatly, courts of law had jurisdiction over actions for damages, and held jury trials; chancery courts granted specific and injunctive remedies, and had jurisdiction over trusts; and Ecclesiastical courts had the exclusive power to probate wills and administer estates. At the end of the eighteenth century, the federal district courts of the United States were given original jurisdiction over "all suits of a civil nature at common law or in equity." Whether intentionally or by over-

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191 In addition, in some situations in which the federal court has jurisdiction, it nevertheless may elect to abstain from exercising that jurisdiction. Because the cases of tortious interference in the states of the Fourth Circuit are all state cases, speculation about application of the various federal abstention doctrines is even more difficult than the jurisdictional issue, and will not be addressed in this Article.


193 Judiciary Act of 1789, ch. 20 §11, 1 Stat. 73.
sight, suits that would be heard by English Ecclesiastical courts were omitted.\(^{194}\)

In a sense, the "probate exception" is a misnomer; jurisdiction over probate is something the federal courts arguably never had at all.

The leading twentieth-century United States Supreme Court case reaffirming and clarifying the probate exception is *Markham v. Allen*,\(^ {195} \) in which the Court held that

> although a federal court may not probate a will or administer an estate, it may entertain suits in favor of creditors, legatees, heirs and other claimants against a decedent’s estate to establish their claims so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court.\(^ {196} \)

Of course, many other claims also stand in some relation to probate or estate administration, including claims against third parties such as tortious interference, and often it is not easy to tell whether a particular claim falls on one side or the other of the *Markham* divide.

Fortunately, the Fourth Circuit has a well-developed jurisprudence in this area.\(^ {197} \) The leading post-*Markham* Fourth Circuit case, *Foster v. Carlin*,\(^ {198} \) held that

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\(^{194} \) Some commentators are deeply critical of the probate exception, describing it as "arising out of obscure historical distinctions," "an artificial interpretation of the Act, in the context of its English legal antecedents." Gregory Luke & Daniel Hoffheimer, *Federal Probate Jurisdiction: Examining The Exception To The Rule*, 39 FED. B. NEWS & J. 579 (Nov./Dec. 1992). Nevertheless, even the critics acknowledge that "The probate exception is alive and well in all circuits; it survives with Supreme Court support." *Id.*

\(^{195} \) 326 U.S. 490 (1946).

\(^{196} \) *Id.* at 494.

\(^{197} \) Two pre-*Markham* cases similarly recognized the exception. See Cottingham v. Hall, 55 F.2d 664, 665 (4th Cir. 1932) ("[F]ederal courts have no jurisdiction in matters of probate administration... while federal courts may not take jurisdiction in cases involving the probate of a will or cases attempting to disturb the possession of an estate properly in the hands of a state probate court or involving the conclusiveness of judgments of state courts in such matters, yet where, as here, the suit is simply a suit by distributees seeking to establish their right to their shares, and enforce such rights against a fiduciary and his surety, a federal court has jurisdiction.") (finding that federal jurisdiction exists to enforce a trust against a fiduciary where the administration of the estate had been completed); Ladd v. Tallman, 59 F.2d 732 (4th Cir. 1932) ("It has been repeatedly held, and we know of no decision to the contrary, that federal courts may not take jurisdiction in cases involving the probate of a will or cases attempting to disturb the possession of an estate properly in the hands of a state probate court or involving the conclusiveness of judgments of state courts in such matters.") (applying the exception). It should be noted that the *Cottingham* court specifically found jurisdiction on the "equity," rather than the "law," side of the federal court, on analogy to the English Chancery court's jurisdiction over trust administration. *Cottingham*, 55 F.2d at 665-66.

\(^{198} \) 200 F.2d 943 (4th Cir. 1952).
[t]he law is well settled that the federal courts have no jurisdiction over matters within the exclusive jurisdiction of state probate courts. However, as to matters which do not involve administration of an estate or the probate of a will, but which may be determined in a separate action inter partes in the courts of general jurisdiction of the state, the federal courts do have jurisdiction if the requisite diversity of citizenship exists. 199

Hence, under Foster, the crucial determination is whether the claim is one within the probate court’s exclusive jurisdiction (in which case there is no federal jurisdiction), or instead could be brought in a state court of general jurisdiction in the state where the federal court sits (in which case federal diversity jurisdiction may exist in a proper case). 200

Foster has been relied on as the definitive application of Markham by district courts in all the states of the Fourth Circuit, 201 and has been referred to with approval by the Fourth Circuit itself as recently as 1999. 202 Notice that Foster’s strict reliance on the precise jurisdictional limits of the probate court of each particular state precludes the development of a completely uniform probate exception across the Circuit. Nevertheless, Foster assures uniformity in the method used to determine whether a particular claim falls under the probate exception or not – namely, a determination of whether the claim is within the exclusive jurisdiction of the state probate court. If not, and particularly if the claim is outside the probate court’s jurisdiction, the probate exception will not apply, and federal diversity jurisdiction may exist.

Now we are in a position to undertake an examination of the parameters of the probate exception in each of the states of the Fourth Circuit. First, we will examine the states that recognize the tort, and then turn to those that do not.

There are reported cases from federal district courts in North Carolina both applying and declining to apply the probate exception. In Sisson v. Campbell University, Inc., 203 the Federal District Court for the Eastern District of North Carolina found that it had jurisdiction over a claim by an executrix of an estate against a trust beneficiary for breach of trust, breach of fiduciary duty,

199 See id. at 947.

200 See id.


and conversion.\(^{204}\) The federal court found that it had jurisdiction notwithstanding that it lacked power to grant some of the relief requested,\(^{205}\) and that probate and related proceedings were still pending in state court.\(^{206}\) That the case concerned a trust, traditionally within the equity jurisdiction of the court, supports this result, but potentially limits its applicability in the tort context. However, the court also supported its finding of jurisdiction with the observation that the claim is one \textit{in personam}, not \textit{in rem} (like a probate proceeding) or \textit{quasi in rem},\(^{207}\) a distinction which would also apply to the tort claim.

In \textit{Oliver v. Oliver},\(^{208}\) the Fourth Circuit affirmed the Eastern District of North Carolina’s dismissal of a case for lack of subject matter jurisdiction under the probate exception. The case was a declaratory judgment action seeking to describe “the rights, duties, and obligation of the parties under [a] will, a codicil, and [a] note,” directing the executor “to abstain from making certain decisions or taking certain actions in the administration of the estate and to provide specific information concerning the estate; [and] deciding certain questions concerning the administration of the estate.”\(^{209}\) Applying the method of \textit{Foster}, the Fourth Circuit found that North Carolina law gives the clerk of the superior court exclusive jurisdiction over the probate of wills and the administration of estates; that the claims raised could have been brought at the hearing to close the estate; and that the relief requested would be an impermissible interference with the administration of the estate.\(^{210}\) Notice that in this case, the court did not distinguish between remedies within and those outside the federal court’s jurisdiction; because “all” the claims fall within probate jurisdiction, federal jurisdiction is lacking.\(^{211}\) In \textit{Dulin}, the North Carolina Supreme Court concluded its opinion by stating, “As the action is not to set up the will, nor against the estate, but against the defendants individually for their tort, the action could be brought in the county where the plaintiff resides [rather than where the will must be probated, the decedent’s county of residence at death].”\(^{212}\) This procedural remark suggests, albeit indirectly, that the tort claim is not within the exclusive jurisdiction of the probate court, because it can be filed elsewhere, and that diversity jurisdiction would be proper under \textit{Foster}.

Similarly, although no West Virginia federal court has yet ruled on the

\(^{204}\) See id. at 1065, 1069.

\(^{205}\) See id. at 1068.

\(^{206}\) See id. at 1066-67.

\(^{207}\) See id. at 1067.

\(^{208}\) No. 98-1460, 1999 WL 308594 (4th Cir. May 17, 1999).

\(^{209}\) See id. at *1.

\(^{210}\) See id.

\(^{211}\) See id.

\(^{212}\) Dulin v. Bailey, 90 S.E. at 690 (N.C. 1916).
jurisdictional issue in the tort context, the reasoning in Barone strongly suggests that diversity jurisdiction exists and the probate exception does not apply. The West Virginia Supreme Court of Appeals specifically rejected the trial court's position that the tort suit is a collateral attack on the probated will, and held that the tort "is not within probate court jurisdiction." Based on a similar conclusion reached by an Illinois state court, the Seventh Circuit found that this cause of action was therefore not "ancillary to probate" and not covered by the probate exception. This suggests that West Virginia would reach the same result. West Virginia has only a single case applying the probate exception, decided in 1999. In Jones v. Harper, the district court dismissed a father's suit against his deceased daughter's husband, seeking to remove the son-in-law as personal representative and appoint the father, while the estate was still open. The court's rationale was that "the removal and appointment of a personal representative clearly would interfere with the administration of the estate," and that "the probate exception prevents this federal Court from interfering with an open state probate proceeding." The court noted that had the estate been closed, and had the father sought appointment solely for the purpose of prosecuting a wrongful death claim, the result might have been different. Jones suggests that in West Virginia, the probate exception would not bar the tort, at least after the close of probate. Because Barone does not impose an exhaustion requirement, it appears that a tort plaintiff would not jeopardize his claim by awaiting the close of probate before filing in federal court.

As noted above, among states of the Fourth Circuit not recognizing the tort, Maryland appears closest to doing so. Although there are three Maryland probate exception cases, they are all in the trust area, traditionally covered by equity jurisdiction, and thus perhaps not analogous to the tort context. In Akrotirianakis v. Burroughs, the Maryland district court endorsed Foster, and declined to apply the probate exception to an action for rescission of a sale of realty to a trustee at a below-market price, in breach of fiduciary obligations. Specifically, the court reasoned that rescission of the sale is a remedy outside the jurisdiction of the probate court (called in Maryland the "Orphans' Court"), and exclusively within equity jurisdiction. Following Foster, the court noted

214 Georges v. Glick, 856 F.2d 971, 974-75 (7th Cir. 1988).
216 See id. at 532.
217 Id. at 533.
218 See id. at 534, n.2.
220 See id. at 923.
221 See id. at 922.
that if the claim were brought in a county court of general jurisdiction, "no reasonable objection to its jurisdiction could be raised," and therefore, federal jurisdiction was proper. In 
Hershon v. Cannon, the court similarly declined to apply the probate exception to a suit by buyers of real property against the personal representative of the estate that owned the property. The remedy sought was again outside the jurisdiction of the Maryland probate court, because under Maryland law, only an equity court of general jurisdiction can determine title to real property. The court also noted that this federal suit would not interfere with the administration of the estate. Finally, in Conboy v. Norwest Bank Indiana, N.A., the Maryland district court applied the exception to bar the claim of an apparently disappointed heir against the bank serving as personal representative and trustee of the estate of his relative. Although these cases are in the trust area, to the extent that the tort makes punitive damages and attorney's fees available, as it typically does, a tort claim seeks a form of relief beyond the jurisdiction of the probate court, and this remedy-oriented approach therefore seems favorable to conferral of federal jurisdiction in the event that the tort is recognized.

South Carolina currently does not recognize the tort. In addition, only one South Carolina federal district court case has addressed the probate exception. In Beattie v. J.M. Tull Foundation, the South Carolina district court declined to apply the probate exception to a declaratory judgment action regarding trust administration, including some elements of estate administration, for a closed estate. Following Foster and the pre-Markham Fourth Circuit cases of Cottingham and Ladd, the district court first looked to whether the action could be maintained in a state court of general jurisdiction, and found that it could be. Interestingly, although under South Carolina law the probate court has exclusive jurisdiction over a claim of this type, the claim is removable to a court of general jurisdiction, and that was considered good enough to support federal jurisdiction. In addition, as the court said, "Presumably, after thirty years, the

222 Id.
224 See id. at *2-*3.
225 See id. at *3.
226 See id.
228 See id. at *1. The opinion is extremely terse; this conclusion is based only on the fact that the plaintiff and the decedent share the last name "Conboy."
230 See id. at 59.
231 See id. at 58.
232 See id. at 59.
estate has already been distributed and closed,” and therefore, requiring the court to construe the terms of the testamentary trust will not disturb that process. Although this is a trust case, the court did not look to the circuit court’s equity jurisdiction in its reasoning. On this basis, if the South Carolina state courts were to recognize the tort as an independent action at law for damages, it appears that the rationale of Beattie would support federal jurisdiction over the claim.

Finally, although the state of Virginia also does not recognize the tort, the Virginia probate exception cases indicate that the exception is applied narrowly, and that the presence of prayers for relief that fall outside federal jurisdiction does not disqualify cases from being heard in federal court there. The leading Fourth Circuit probate exception case, Foster v. Carlin, came out of Virginia, and the opinion therefore provides not only methodological but substantive guidance as to the scope of the probate exception in Virginia. In Foster, the Fourth Circuit held that an action to pass on the validity of a settlement agreement, entered into by heirs of the decedent, fell outside the probate exception. Crucial to this result was a finding that the Virginia court was without jurisdiction to make this determination, and a separate action in equity would be needed to do so. Hence, federal jurisdiction existed, even though one of the forms of relief requested, a declaration that the decedent died intestate, was outside federal jurisdiction. In the recent case of Law v. Law, the Eastern District of the Federal District Court for the Eastern District of Virginia found that the probate exception did not bar the suit of a widow against her late husband’s father for breach of a contract relating to payment of estate expenses. After a careful review of Ladd, Cottingham, Foster, and Sisson, the district court concluded that an action to determine “whether the alleged contract was made, and if so, what funeral expenses and other debts existed at the time of decedent’s death . . . would have no impact on the administration of the probate estate, and therefore federal subject matter jurisdiction exists for the contract claim.”

Again, as in Foster, one form of relief sought was held to be outside federal jurisdiction, but this did not affect the central question of the application of the probate exception. Hence, in Virginia, it appears that should the tort be recog-

233 See id.
234 200 F.2d 943 (4th Cir. 1952).
235 See Foster, 200 F.2d at 951.
236 See id. at 950.
237 See id.
239 See id. at 1111.
240 Id.
241 See id. at 1111, n.9. The extra-jurisdictional remedy sought here was that defendant specifically perform the contract by distributing the estate in a particular way. Id.
nized, the probate exception would not exclude such cases from federal court. As a breach of contract case, the aptly-named *Law* opens the door of federal court a bit wider than some of the probate exception cases that explicitly rely on federal *equitable* jurisdiction to allow certain claims into federal court.

VI. CONCLUSION

With respect to the tort of intentional interference with expectation of inheritance, the states of the Fourth Circuit are a microcosm of the country as a whole. Each has chosen to balance the claims of injured plaintiffs and the boundaries of the probate system in its own way. Virginia and West Virginia are at opposite ends of the spectrum: Virginia refuses to recognize the tort at all, while West Virginia apparently gives the disappointed heir an election of remedies in either probate court or a tort action at law. North Carolina, one of the first states in the U.S. to validate the tort, takes what can be considered the mainstream view among states that recognize it; namely, that the tort is available only to those plaintiffs who cannot receive an adequate remedy from the probate court. Although it has not happened yet, it appears that there is nothing preventing the tort claim from being brought in federal court under diversity in either of the states that recognize it. In their stance towards the tort, South Carolina and Maryland fall somewhere between North Carolina and Virginia. In neither state has a plaintiff appeared with a claim the court is ready to recognize, yet a certain sympathy for the action itself can be detected, particularly in Maryland. For estate law practitioners and tort scholars alike, the Fourth Circuit is one to watch.