Official Publication of the California Lawyers Association
Trusts and Estates Section

California Trusts and Estates Quarterly

Volume 27, Issue 2 • 2021

Inside this Issue:

Tips of the Trade: New Standard for Appellate Review of Findings Supported by Clear and Convincing Evidence..... 6
In *Conservatorship of O.B.* (July 27, 2020), the California Supreme Court announced a new, less deferential standard of appellate review of trial court findings and judgments that must be supported by clear and convincing evidence. This article looks at the facts and holdings of the case and how it may affect appeals of trusts and estates cases.

- **Ciarán O'Sullivan, Esq.**

Let's Get Digital! ESI in Trust and Estate Litigation, Part 1 11
This is the first of a two-part series on electronically stored information ("ESI") in trust and estate litigation. This first part covers the rules governing ESI and provides practical guidance for applying those rules in the context of trusts and estates.

- **Scott A. Fraser, Esq. and Matthew R. Owens, Esq.**

After *Beckwith*: An Update on the Interference with Inheritance Tort in California..... 23
California has recognized the tort of intentional interference with expectancy of inheritance (IIEI) since 2012, with the publication of *Beckwith v. Dahl*. This article reviews *Beckwith* and discusses *Gomez v. Smith*, which is the first published decision on IIEI since *Beckwith* and the first published California decision to uphold recovery on an IIEI claim.

- **Evan D. Winet, Esq.**

How to Invade Someone's Privacy 101.....35
The right to privacy is one of the most frequently raised objections in the course of trust and estate litigation. This article explores the methods for compelling disclosure of private information, arguments used to prevent disclosure, the nuances when the information is sought during one's life versus after death, and the standard that courts apply in determining whether the right to privacy should yield to evidentiary needs.

- **Erin A. Norcia, Esq. and Hengameh Kishani, Esq.**

Weaponizing the Litigation Process—When Litigation Results in the Taking of Hostages..... 45
What happens when the legal process doesn't work because it is being used as a sledgehammer to punish those on the opposing side of litigation? Judge Reva Goetz (Ret.) has seen it happen from the bench and in her alternative dispute resolution practice, and suggests that statutory improvements are needed to protect "hostages"—parties dragged into an unnecessary war, or those apprehensive of pursuing relief and starting a war.

- **Hon. Reva Goetz (Ret.)**

From the Chair..... 3
From the Editor-in-Chief..... 5
Tax Alert..... 52
Litigation Alert..... 55

AFTER *BECKWITH*: AN UPDATE ON THE INTERFERENCE WITH INHERITANCE TORT IN CALIFORNIA

*By Evan D. Winet, Esq.**

MCLE Article

'Tortious interference?' That sounds like a disease caught by a radio.[1]

I. INTRODUCTION

A. IIEI In California

In 2012, with the publication of *Beckwith v. Dahl,*[2] California recognized the tort of intentional interference with expectancy of inheritance ("IIEI"). The *Beckwith* decision inspired considerable speculation as to whether the new tort would transform the landscape of California trust litigation and perhaps even the role of the probate courts.[3] Indeed, since *Beckwith*, many litigators have pled IIEI, typically as a cause of action in a civil complaint, sometimes concurrently with a probate proceeding. In late 2020, the increase of such practices finally resulted in California's second published IIEI decision. *Gomez v. Smith*[4] is not only the first published decision on IIEI since *Beckwith*, but the first published California decision to uphold recovery on an IIEI claim. As such, it provides valuable guidance for future IIEI claimants and defendants.

Nevertheless, even with *Gomez*, the usefulness of IIEI to California trust and estate litigation remains somewhat murky. In light of early prognostications both for and against recognizing IIEI, the legacy of *Beckwith* has been underwhelming, or at least more subtle than anticipated. Until last year, *Beckwith* remained the only published case, and the *Beckwith* court declined to rule on the underlying merits. Furthermore, the California Supreme Court has not yet weighed in on the new tort,[5] and there has been no new legislation to provide any kind of statutory guidance.[6] Overall, it does not appear that California has ventured with any confidence into a "brave new world" of inheritance tort claims. Like Mr. Pacino's character in *The Insider*, California has regarded tortious interference with somewhat perplexed skepticism.

B. The National Debate Over IIEI

Meanwhile, the national debate about whether to adopt IIEI and, if so, how to limit it, rages on. At the time of the *Beckwith* decision, California was the 26th state to adopt IIEI.[7] There have been a few scattered decisions suggesting expansion of the number of adopting states.[8] Across other states that had already adopted the tort, a substantial body of case law has begun to support common approaches and principles. Significantly, most states have adopted a five or six prong analysis in evaluating IIEI claims similar to that set out in *Beckwith*, and this growing consensus has been endorsed by section 19 ("Section 19") of the new Restatement Third of Torts (published in 2020).[9] Meanwhile, about a dozen states have explicitly declined to recognize the tort,[10] and some of the states whose courts previously endorsed IIEI have even reversed or significantly curtailed that recognition.[11] Suffice to say that at the national level, acceptance of IIEI has been highly volatile, notwithstanding the declaration of the United States Supreme Court in 2002 that the tort is "widely recognized."[12]

At the outset, it should be noted that IIEI is an area in which California litigants would be especially well advised to consider authorities beyond California case law. California courts generally must look to the common law where no California authority can be found on a particular question,[13] and the common law is presumed to be the rule of decision in other states.[14] Such recourse to the common law is particularly appropriate in construing IIEI in California where: 1) there have only been two published decisions, and 2) authority for recognizing the tort is drawn from section 774B of the Restatement Second of Torts ("Section 774B"), which has been interpreted both by the case law of numerous states and several subsequent Restatements of the Law. Given these considerations, this article will cite liberally to non-California authority on IIEI.

II. BARBARIANS AT THE GATES OF PROBATE COURT

Section 774B, defines IIEI 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."[15] IIEI is thus, at least in theory, a fundamentally different claim from any typically brought in probate. Trust and estate proceedings exert in rem jurisdiction; they concern the disposition of the property of an estate or trust.[16] An IIEI action, in contrast, is in personem; it pertains to a specific plaintiff's rights to recover against a specific defendant. It follows from this distinction that a potential heir claiming IIEI might obtain relief regardless of the validity of instruments, the assets remaining in an estate or that claimant's own standing (or lack thereof) in a related probate proceeding.

It is enshrined in the Civil Code that for every wrong, there must be a remedy.[17] Advocates of IIEI argue that the tort is needed because there are aggrieved beneficiaries whose wrongs, for one reason or another, cannot be remedied in probate. Situations where probate may fail to provide adequate remedy arguably include the following: 1) where an action is properly brought prior to the settlor's death (e.g., due to likely spoliation of evidence);[18] 2) where the defendant causes the settlor to transfer property out of their estate during their lifetime;[19] 3) where the defendant's own wrongful conduct in some way prevented the settlor from making the plaintiff a beneficiary of an instrument;[20] 4) where a defendant's own wrongful conduct in probate prevents a plaintiff from seeking probate remedies (e.g., by completing probate of a fraudulent will);[21] 5) where a plaintiff's potential claims in probate are time-barred (e.g., due to expiration of the statutory limitations period for a will contest);[22] 6) Where the alleged interference involves an expectancy in non-probate assets (e.g., plaintiff's status as a joint tenant on real estate or a joint account, or as a designated beneficiary on a policy or investment);[23] or 7) where the plaintiff's expectancy is interfered with by a defendant who does not actually receive the property at issue.[24]

Detractors of IIEI have argued that the tort undermines the probate system for no good reason because remedies available in probate are actually sufficient to address nearly any legitimate inheritance claim. In an oft-cited article published shortly after the *Beckwith* decision, John Goldberg and Robert Sitkoff take up this argument, explicitly rejecting the claim that IIEI provides remedies unavailable in probate:

> [I]n almost any circumstance in which a prospective beneficiary could make out a tort claim to remedy wrongful interference with an expected inheritance, those same interests could be vindicated through the traditional inheritance law procedures of a probate will contest or an action in restitution. The remaining circumstances in which the tort has been invoked, typically involving fraud in a probate proceeding or wrongful procurement of an inter vivos transfer that depletes the decedent's estate are likewise covered by well-established non-tort procedures.[25]

Goldberg and Sitkoff argue that any of the situations contemplated in relation to IIEI may be addressed through equitable remedies (e.g., imposition of a constructive trust) that are available in a probate proceeding.[26] They maintain that the IIEI tort is pernicious not only because the problem it purports to solve is chimerical, but also because it undermines the principles of freedom of disposition on which American trust law is based.[27] IIEI, they argue, allows a plaintiff to bypass the probate court's elevation of the settlor's intent as the fundamental guiding principle and allow a claimant effectively to circumvent an estate plan by seizing bequests directly from beneficiaries.[28]

Counsel on either side of an IIEI claim will be well-advised to frame their arguments in relation to these long-standing policy perspectives. The defendant may often argue effectively that an IIEI claim would be duplicative of other causes of action, that any legitimate rights of the plaintiff may be adjudicated in probate, or that the plaintiff has failed to exhaust remedies in probate. The defendant may further argue that it is inefficient, wasteful, and a misuse of the structure of the court system to divert inheritance claims into a civil court and that California courts have created probate departments for the purpose of exercising superior expertise over such matters. The plaintiff, in contrast, must frame the nature of an IIEI claim with care and be prepared to explain why there is no adequate remedy in probate. A plaintiff who adopts the common strategy of initiating parallel proceedings in probate and civil courts must be prepared to argue why an IIEI claim is not merely an attempt to take a "second bite at the apple."

III. *BECKWITH* AND *GOMEZ*

California courts dealt with the issues addressed by IIEI for at least a century prior to *Beckwith* without the benefit of a recognized tort. Opponents of IIEI often point to early cases such as *In re Silva's Estate* (1915), *Brazil v. Silva* (1919)[29] and *Caldwell v. Taylor* (1933)[30] as proof that IIEI is unnecessary. The tort was briefly recognized in 1989 in *In re Legeas*,[31] but that opinion was depublished two and a half months later. Various decisions from the 1980s and thereafter have decided IIEI-like claims on other grounds without recognizing the tort.[32] Then, just two years before a Fourth District Court of Appeal panel decided *Beckwith*, a different division of the same appellate district explicitly declined to recognize the tort in *Munn v. Briggs*.[33]

A. *Beckwith v. Dahl*: Establishing The Tort And Its Analytic Framework

In 2012, *Beckwith* established IIEI and provided the analytic framework that has been used subsequently. And yet, *Beckwith* is not an IIEI decision on the merits.

In *Beckwith*, the decedent (Marc MacGinnis) was the sole sibling of Susan Dahl and had an intimate relationship with plaintiff Brent Beckwith.[34] Beckwith and MacGinnis were neither married nor domestic partners. MacGinnis

died intestate, unmarried and without descendants; thus, the estate would pass through intestacy to his sister, Dahl.[35] At trial, Beckwith alleged that MacGinnis had asked to have a will prepared that would have given his estate to Beckwith and Dahl in equal shares, but that Dahl, two days prior to MacGinnis undergoing surgery, had told Beckwith not to have MacGinnis sign the will because Dahl would have a trust prepared instead.[36] Beckwith relied on Dahl in not having MacGinnis sign the will. However, no trust was prepared or executed, and MacGinnis died intestate six days later.[37] After MacGinnis died, Dahl opened a probate, claiming the entire estate for herself on grounds of intestacy.[38] Beckwith opposed, but the probate court concluded he lacked standing because he was neither an intestate heir nor a creditor of the estate.[39] Denied in probate, Beckwith filed a civil action, alleging IIEI, deceit by false promise and negligence.[40] Dahl demurred and the civil court sustained, in part on grounds that recognition of IIEI should be an appellate decision.[41] And so, Beckwith appealed.

On appeal, the Fourth District affirmed its earlier position in *Munn* that a cause of action for IIEI should not be available where there is "adequate probate remedy."[42] However, this time around, the court found the available probate remedies inadequate. As Adam Streisand summarizes in his 2012 *Quarterly* article, "Beckwith did not receive formal notice of the probate process and did not have standing to contest the intestacy or to claim any right to inheritance. He had no opportunity to challenge the disposition of MacGinnis's estate in the probate proceeding."[43] Having surmounted this hurdle, *Beckwith* lays out a framework for the new tort that is closely aligned with that established in other jurisdictions and which has now been endorsed by Section 19.[44] However, the *Beckwith* court found that the case before it had not satisfied this newly articulated framework—most particularly that the plaintiff had failed to establish independently wrongful or tortious conduct.[45] Given that it had only just established the legal theory Beckwith would have had to prove, the Fourth District remanded to allow the plaintiff to try again.[46]

Back in the trial court, Beckwith filed a First Amended Complaint, and then Dahl filed a Motion for Summary Judgment ("MSJ").[47] In her MSJ, Dahl argued that there was no evidence of Dahl's interference with MacGinnis by any independent tortious conduct aimed at MacGinnis to thwart his testamentary intent;[48] that Beckwith's fraud claim fails because there was no evidence Dahl did not intend to have the Trust documents prepared at the time she allegedly made the promise—she could not have known that MacGinnis would be dead six days later;[49] that causation fails because nothing ever prevented MacGinnis from signing the Will;[50] that intent fails because there's no evidence anybody expected MacGinnis might not come out of surgery;[51] and that Beckwith could not establish that MacGinnis would have signed any instrument. Indeed, as Dahl points out, her brother had gone his entire life without executing any estate documents.[52]

The parties settled before testing these arguments. Nevertheless, Dahl's MSJ provides a useful example of how one might defend against an IIEI claim.

B. *Gomez v. Smith*: Finally, A Judgment On The Merits

It took another eight years for California to see an IIEI opinion on the merits. In *Gomez*, the Third District applies the five-prong analysis of *Beckwith* to affirm recovery for the plaintiff. Strikingly, however, the *Gomez* court reaches this result without discussing whether available probate remedies had been inadequate. The fact that the Third District didn't address this issue that had so dominated nearly all prior treatment of the tort in California may suggest the crossing of a certain threshold into acceptance for IIEI.

In *Gomez*, Frank Gomez and his wife, Louise, had married late in life after breaking off their engagement upon Frank's departure to serve in the Korean War.[53] When Frank fell ill, he attempted to establish a new living trust that would have provided a life estate for Louise.[54] However, Frank's disease progressed quickly. The day after he entered hospice care, Tammy, Frank's daughter from a prior marriage who was also Frank's attorney-in-fact under a power of attorney, prevented his estate planner from entering the house to present the new instruments for Frank's signature.[55] Frank died early the next morning.

Louise sued Tammy and her brother Richard for IIEI, intentional infliction of emotional distress and elder abuse, and Tammy and Richard filed a cross-complaint to recover from Louise property they alleged to have belonged to the trust Frank had established with his prior wife, their mother.[56] The trial court, after a bench trial, issued a statement of decision finding in favor of Louise as to IIEI and denying relief on all other claims. Tammy and Richard appealed, and the Third District affirmed.[57] The court found that substantial evidence supported that Louise had an expectancy in an inheritance from her husband; that Tammy and Richard had known of that expectancy; that Tammy had committed independently wrongful conduct against Frank (undue influence and breach of fiduciary duty); and that Frank would have had the mental capacity to execute the new trust, had he been permitted to do so.[58]

IV. THE PLAINTFF MUST ESTABLISH THE FIVE ELEMENTS OF IIEI

The *Beckwith* court set out a five-prong framework for establishing IIEI that closely tracks similar frameworks in other states as well as that set out in Section 19 of the new Restatement Third of Torts. This relative consistency across jurisdictions should give California practitioners confidence that they may cite to external authorities where the sparse California case law is not on point. However, in *Beckwith*, rather than systematically apply the framework it had just established to the facts of that case, the court simply notes:

> Here, Beckwith alleged he had an expectancy in MacGinnis's estate that would have been realized but for Dahl's intentional interference. However, Beckwith did not allege Dahl directed any independently tortious conduct at MacGinnis. The only wrongful conduct alleged in Beckwith's complaint was Dahl's false promise to him. Accordingly, Beckwith's complaint failed to sufficiently allege the IIEI tort.[59]

In other words, the *Beckwith* court leaves it to the trial court to apply the new law to facts, which the parties' settlement ultimately spared it from doing. We must look instead to the application of the *Beckwith* framework in *Gomez* and in the common law of other states that have adopted IIEI.

1. Reasonable Expectation: What To Expect When You Argue Expectancy

Under *Beckwith*, the plaintiff must establish the existence of an expectancy; "the plaintiff must plead he had an expectancy of an inheritance."[60] Likewise, Section 19 sets out a requirement that "the plaintiff had a reasonable expectation of receiving an inheritance or gift."[61]

Critics of IIEI, like Goldberg and Sitkoff, see in this notion of "expectancy" as a basis of tort recovery a conflict with the fundamental probate principle that a beneficial interest "does not ripen into a cognizable legal right until the donor's death." Until then, the reasoning goes, any purported beneficial interest is a mere expectancy, "subject to defeasance at the donor's whim."[62] A defendant in an IIEI action will likely want to emphasize the ephemeral and mercurial nature of such "mere" expectancies. On the other hand, the economic value of such expectancies is well-established. For example, an expectancy may be offered as consideration for contracts.[63] Furthermore, allowing torts based on interference with expectancy of inheritance is arguably a logical extension of existing torts for interference with economic expectancies, such as the tort of interference with prospective economic advantage.[64] A plaintiff in an IIEI action may benefit from reviewing the analogous case law of other torts for interference with economic expectancies.

The existence of an expectancy is generally satisfied where a decedent took some step toward perfecting the inheritance or gift. In finding this prong satisfied in *Gomez*, the court relied substantially on testimony of the estate planner that Frank had wanted to change his estate plan and had made it clear that he wanted Louise to be trustee of his trust and to have a life estate in its assets.[65] Other courts have found the "existence of an expectancy" prong satisfied by showing a designated inheritance under a revoked will[66] or evidence of a draft of a will.[67] Some courts have relied on parol evidence of decedent's intent.[68] Some courts have allowed plaintiffs to rely on intestate succession to establish expectancy (a view endorsed by Section 19),[69] or even extending such logic to find expectancy in the "natural objects" of the decedent's bounty.[70] As *Beckwith* clarifies, the plaintiff is merely required to establish an expectancy, not a documented property interest. The plaintiff need not be named beneficiary to any instrument or otherwise establish the existence of a beneficial property interest. "It is only the expectation that one will receive some interest that gives rise to a cause of action."[71]

2. Third Party Interference: Two's Expectancy, Three's A Tort

Section 19 sets out a requirement that "the defendant's purpose was to interfere with the plaintiff's expectancy."[72] Under *Beckwith*, the plaintiff must establish intent; "that the defendant had knowledge of the plaintiff's expectancy of inheritance and took deliberate action to interfere with it."[73] The prong under *Beckwith* thus combines intent ("deliberate action") with a requirement that the alleged tortfeasor had knowledge of the expectancy, whereas such knowledge is, arguably, implicit in the Section 19 standard.

This prong represents a shift from the familiar focus of probate law on *settlor* intent to the tort law focus on whether the *defendant's* allegedly wrongful conduct was intentional, purposeful or deliberate. It is not entirely clear whether "deliberate action" in *Beckwith* is the same thing as "purposeful interference" in Section 19. However, the *Beckwith* court makes it clear that such intentional interference must be directed not at the plaintiff, but at the decedent.[74] "[T]he defendant's tortious conduct must have induced or caused *the testator* to take some action that deprives the plaintiff of his expected inheritance."[75] As Streisand points out, this emphasis on interference with a third party, i.e. the settlor, distinguishes IIEI from a fraud claim: "If the defendant

made false statements to the testator to induce the testator to change her estate plan, the IIEI plaintiff would not generally have a cause of action for fraud against the defendant: the plaintiff was not defrauded."[76]

The *Gomez* court finds that substantial evidence supported finding that Tammy knew of Louise's expectation and purposefully interfered with the estate planner's attempt to provide the new instrument for Frank to execute. Here, the Third District relies on the trial court's findings that "Tammy was unhappy about Frank's marriage to Louise," and witness testimony and circumstantial evidence that Tammy and Richard "knew the purpose of [the estate planner's] visit was to create a trust wherein plaintiff would receive an inheritance" and that the estate planner "was prevented from entering the residence by the defendants' actions."[77] The *Gomez* court's reasoning on this prong aligns with other IIEI cases where the defendant interferes with a settlor's attempts to change their estate plan.[78] The prong may also be satisfied, for example, where a defendant procures a new instrument in their favor by undue influence[79] or intentionally fails to honor an agreement to draft a will favoring the plaintiff.[80]

3. Independently Wrongful Conduct: Two Wrongs Make the Plaintiff Right

Under *Beckwith*, the plaintiff must establish "that the interference was conducted by independently tortious means, i.e., the underlying conduct must be wrong for some reason other than the fact of the interference."[81] Likewise, Section 19 sets out a requirement that "the defendant committed an intentional and independent legal wrong."[82] As Section 19 elaborates, IIEI requires,

> a showing that the defendant engaged in intentional conduct that is independently recognized as wrongful by applicable law. Such conduct can include acts that are tortious or criminal, including breach of fiduciary duty. They also may include acts recognized as wrongful in equity, such as the use of duress or exertion of undue influence…By contrast, merely persuading a testator to disinherit an heir does not give rise to liability.[83]

Section 774B likewise comments, "[t]he usual case is that in which the third person has been induced to make or not to make a bequest or a gift by fraud, duress, defamation or tortious abuse of fiduciary duty, or has forged, altered or suppressed a will or a document making a gift."[84] The *Gomez* court cites the Oregon Supreme Court, which states, quite broadly, that the "Defendant's liability may arise from improper motives or from the use of improper means. They may be wrongful by reason of a statute or other regulation, or a recognized rule of common law."[85] In any case, IIEI cannot be found "[i]n the absence of conduct independently tortious" in some such manner.[86]

Independently tortious conduct has been found where a daughter, upon learning of her father's intent to change his will, checked him into a hospital and dissuaded the estate planner from seeing him before his death on the false grounds that he lacked capacity.[87] In contrast, courts have found no independently tortious conduct where a non-fiduciary defendant merely persuaded a settlor to destroy a will[88] or not to change a will,[89] or a non-fiduciary refused to make a transfer in completion of a gift.[90] In *Beckwith*, the court identifies it as the key failing in Beckwith's complaint that he alleged a false promise by Dahl to Beckwith himself but no independently tortious conduct toward MacGinnis.[91]

The *Gomez* court relies on the trial court's finding that Tammy had directed two separate types of tortious conduct against Frank: undue influence and breach of fiduciary duty.[92] In finding undue influence, the *Gomez* court applies the definition in section 1575 of the Civil Code.[93] The court finds the section 1575 standard satisfied by substantial evidence that Tammy "took a grossly unfair advantage of Frank's distress," knew of his vulnerability, took actions to separate him from his estate planner, and intentionally prevented Frank from fulfilling his intent to alter his estate plan.[94] "Frank's will was overborne by Tammy because he was bedridden and unable to intervene when Tammy precluded [the estate planner] from entering the home."[95] The court also finds that substantial evidence supports that Tammy, who was an attorney-in-fact for Frank under a power of attorney, breached her fiduciary duty under section 4232 of the Probate Code[96] by acting in her own interest and not that of Frank, her principal.[97]

4. Causation: Being Reasonably Certain of One's Expectancy

Under *Beckwith*, the plaintiff must establish causation. The *Beckwith* court elaborates this prong by citing to Section 774B: "This means that, as in other cases involving recovery for loss of expectancies…there must be proof amounting to a reasonable degree of certainty that the bequest or devise would have been in effect at the time of the death of the testator…if there had been no such interference."[98] Likewise, Section 19 sets out a requirement that "the defendant's conduct caused the expectancy to fail."[99]

This "but for" causation requirement, and the particular admonition of the *Beckwith* court that it be shown with

"a reasonable degree of certainty," together compromise a response to the broad concern that expectancies are too uncertain to support tortious relief. Section 774B reflects that causation can be shown "with complete certainty" in some situations, "as when a will is suppressed or altered after the death or incompetence of the testator."[100] However, such "complete" certainty is not required:

> If there is reasonable certainty established by proof of a high degree of probability that the testator would have made a particular legacy or would not have changed it if he had not been persuaded by the tortious conduct of the defendant and there is no evidence to the contrary, the proof may be sufficient that the inheritance would otherwise have been received.[101]

Section 774B also contemplates that where the defendant's own tortious conduct suppresses the evidence, the court should exercise broader discretion in inferring causation.[102]

Section 774B notes that causation is always satisfied in cases involving will suppression because there is complete certainty.[103] However, it may not be so simple. If the alleged mechanism of suppression is duress, coercion, or undue influence, the plaintiff will likely face evidentiary challenges all too familiar to trust litigators and need to rely heavily on circumstantial evidence that a settlor's free choice was overcome. Difficulties in showing causation also arise where the IIEI claim is brought while the settlor is still alive. Some courts have held that plaintiffs "were not damaged" by a defendant's interference with inheritance until the settlor died.[104] On the other hand, one court has found that where gifts were allegedly procured from a parent through fraud and undue influence, an IIEI claim could be brought while the parent was still alive.[105]

The *Gomez* court folds the causation prong into its analysis of Tammy's knowledge of the expectancy. The *Gomez* court finds substantial evidence showing that the estate planner "was prevented from entering the residence by the defendants' actions" and that Frank was thereby prevented from changing his estate plan.[106] Such a finding of active suppression would constitute complete certainty under Section 19.

5. Damages: But What's The Harm?

Lastly, "the plaintiff must plead he was damaged by the defendant's interference" (*Beckwith*),[107] or that "the plaintiff suffered economic loss as a result." (Section 19)[108] For the purposes of proving IIEI liability, this is typically not a difficult prong to satisfy. If the defendant's conduct caused an interference with the plaintiff's inheritance, it will usually not be difficult to establish that such interference resulted in economic loss.

It is a separate consideration, and beyond the scope of this article, what remedies may be available in a successful IIEI action. Section 19 notes that tort remedies may exist alongside remedies provided by the law of restitution.[109] In a civil jury trial, it is possible that an IIEI claimant might seek punitive damages that, in theory, could substantially exceed any remedies available in a probate action. However, neither the *Beckwith* nor *Gomez* courts explore this possibility.

The *Gomez* court affirms the trial court's imposition of a constructive trust in favor of Louise, creating a life estate in that property as contemplated by the thwarted new trust that Tammy prevented her father from executing.[110] Thus, at the end of the day, the IIEI action in *Gomez* resulted in a fairly typical equitable remedy of a sort commonly seen in probate. Punitive damages did not come into play. By the same token, nothing in the *Gomez* or *Beckwith* holdings precludes the availability of punitive damages or any other theory of relief for IIEI claimants.

6. NO WAIT, SIX ELEMENTS!: THE ELUSIVE INADEQUACY OF PROBATE

Both *Beckwith* and Section 19 include, separate from the five-prong framework, a requirement that there not be adequate probate remedy for the claimed injury. Section 19 states this requirement clearly within its analytic framework: "A claim under this Section is not available to a plaintiff who had the right to seek a remedy for the same claim in a probate court."[111] The *Beckwith* court, in contrast, though stating the requirement clearly, discusses it within the opinion's policy background rather than alongside the five-prong framework. Here, in the context of discussing policy concerns, the court notes "the tort of IIEI is only available when the aggrieved party has essentially been deprived of access to the probate system."[112] The fact that the *Beckwith* court deals with the issue in such an ancillary fashion raises the question of whether it is truly an essential component of the analytic framework. The Restatements and the vast majority of the case law treat it as such; however, the *Gomez* court declines to address the issue.

That said, there has been considerable agreement on the principle that IIEI should only be available where probate remedies are not. The *Beckwith* court, endorsing the *Munn* court's analysis on the subject, asserts that "[b]y applying a similar last recourse requirement to the tort in California, the integrity of the probate system is protected because where a probate remedy is available, it must be pursued."[113] Another

court has explained that "[t]he 'adequate remedy' requirement refers to the availability of a procedure under the probate code capable of providing the relief sought in the civil petition. It is inconsequential whether the party is ultimately successful in obtaining the results desired."[114]

However, it is significantly unclear what it means for the probate code to be capable of providing the relief sought in a civil action. A civil complaint for IIEI may contain a request for a jury trial, punitive damages and damages for pain and suffering. The probate code does not explicitly provide for such relief. One might argue that the probate court is *capable* of providing such typically civil forms of relief; however, as a practical matter, most probate courts are reticent to do so. The prevailing trend has been to disregard the availability of jury trials or other specific remedies as a factor in determining whether a plaintiff has adequate remedy in probate. However, in *Huffey v. Lea*,[115] a plaintiff filed and *won* a will contest based on undue influence and lack of capacity, and yet the court determined that an IIEI claim might still be pursued, partly on grounds that the plaintiff had requested punitive damages.[116]

Situations in which courts have found that a plaintiff ***has*** standing to bring an IIEI claim because available remedies in probate are inadequate include where: a plaintiff lacks standing in probate due to the defendant's own wrongful conduct regarding testamentary instruments;[117] the settlor is still living at the time an IIEI action is filed;[118] transfers during the settlor's life had depleted the estate;[119] plaintiff was deprived of standing in probate by defendant's own wrongful conduct in probate;[120] and expiration of the limitations period for a will contest rendered probate remedies inadequate.[121]

Situations in which courts have found that a plaintiff ***lacks*** standing to bring an IIEI claim because they have an adequate remedy in probate include where: the right to contest an instrument is found to be an adequate remedy (even though it contains a no-contest clause);[122] intestacy is found to be an adequate remedy;[123] remedies available under a will contest are found adequate notwithstanding any possibility of greater punitive damages in a civil action;[124] or plaintiffs are found to have failed to avail themselves of a will contest based on undue influence and lack of testamentary capacity.[125]

V. CONCLUSION

Concerns have persisted in recent years that IIEI is at best redundant and at worst pernicious in relation to the probate system and its protections. These concerns are reflected in the continued reluctance of both courts and litigators to embrace IIEI. Defendants to IIEI actions may be well advised to avail themselves of this skeptical tradition. That said, the fact that the *Gomez* court did not find it necessary to establish inadequate probate remedy suggests that courts may be willing to view IIEI not merely as a last recourse, but simply as another available tool in the trust litigator's toolbox. Eventually, the California Supreme Court may be expected to weigh in. Until then, the *Gomez* opinion has confirmed that *Beckwith* was not an anomaly. As a result, we may expect more claimants to shake off Mr. Pacino's skepticism and attempt to replicate Louise's success.

Johnston, Kinney & Zulaica, San Francisco, California

1 The 60-Minutes news reporter, Lowell Bergman (played by Al Pacino) delivers this quip when the big tobacco companies try to use a tortious interference claim to silence a whistleblower. The Insider (Touchstone Pictures 1999). The quote can be found online at <https://www.quotes.net/mquote/1098416> (as of Feb. 24, 2021).

2 *Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039.

3 See, e.g., Adam F. Streisand, *Tortious Interference with Inheritance: Is It A Brave New World in California? Part I* (2012) 18 Cal. Tr. & Est. Q., no. 2, at pp. 5-12; Streisand, *Tortious Interference with Inheritance: Is It A Brave New World in California? Part II* (2012) 18 Cal. Tr. & Est. Q no. 3, at pp. 5-11.

4 *Gomez v. Smith* (2020) 54 Cal.App.5th 1016.

5 Diane J. Klein, the leading chronicler of IIEI, opined (incorrectly, as it now turns out) that "[t]he history of the tort in California strongly suggests that unless or until [the California Supreme Court weighs in], no plaintiff is likely to obtain a recovery on this theory from a court in California." Klein, "*Go West, Disappointed Heir": Tortious Interference with Expectation of Inheritance—A Survey With Analysis Of State Approaches in the Pacific States* (2009) 13 Lewis & Clark L.Rev. 209, 227.

6 Shirley Kovar has advocated "that a state legislature could enact a Probate Code Section that would provide an 'adequate *and exclusive* remedy' for plaintiffs who now file claims for IIEI on the civil side. Such a statute would avoid both a dual, competing litigation track and bring to bear the policy decisions in state probate codes and the expertise of state Probate Courts." Kovar, *The Gatekeeper of Intentional Interference with Expectancy of Inheritance: An*

Inadequate Remedy in Probate (Apr. 5-6, 2015) Presentation at ACTEC Annual Meeting, at p. 13.

7 The 25 states that apparently recognized tortious interference with expectancy of inheritance prior to California are: Colorado (*Lindberg v. United States* (10th Cir. 1999) 164 F.3d 1312); Connecticut (*Benedict v. Smith* (1977) 34 Conn.Supp. 63); Delaware (*Chambers v. Kane* (Del.Ch. 1980) 424 A.2d 311, affd. in relevant part (Del. 1981) 437 A.2d 163); Florida (*DeWitt v. Duce* (1981) 408 So.2d 216); Georgia (*Mitchell v. Langley* (1915) 143 Ga. 827); Idaho (*Carter v. Carter* (Idaho 2006) 146 P.3d 639); Illinois (*Nemeth v. Banhalmi* (1981) 99 Ill. Ct.App. 3d 493); Indiana (*Minton v. Sackett* (1996) 671 N.E.2d 160); Iowa (*Huffey v. Lea* (Iowa 1992) 491 N.W.2d 518); Kentucky (*Allen v. Lovell's Adm'x* (Ky.Ct.App. 1946) 197 S.W.2d 424); Louisiana (*McGregor v. McGregor* (D.Colo. 1951) 101 F.Supp. 848 (apparently applying Louisiana law); Maine (*Cyr v. Cote* (Me. 1979) 396 A.2d 1013); Massachusetts (*Labonte v. Giordano* (Mass. 1997) 687 N.E.2d, 1253); Michigan (*Creek v. Laski* (Mich. 1929) 227 N.W. 817); Missouri (*Hammons v. Eisert* (Mo.Ct.App. 1988) 745 S.W.2d 253); New Jersey (*Casternovia v. Casternovia* (N.J.Sup.Ct. 1964) 197 A.2d 406); New Mexico (*Doughty v. Morris* (N.M. 1994) 871 P.2d 380); North Carolina (*Dulin v. Bailey* (N.C. 1916) 90 S.E. 689); Ohio (*Firestone v. Galbreath* (Ohio 1993) 616 N.E.2d 202); Oregon (*Allen v. Hall* (Or. 1999) 974 P.2d 1999); Pennsylvania (*Cardenas v. Schober* (Pa.Super. Ct. 2001) 783 A.2d 317); Texas (*King v. Acker* (Tex.Ct.App. 1987) 725 S.W.2d 750); Vermont (*Heirs of Adams v. Adams* (1849) 22 Vt. 50); West Virginia (*Barone v. Barone* (W.Va. 1982) 294 S.E.2d 260); and Wisconsin (*Harris v. Kritzik* (Wis.Ct.App. 1992) 480 N.W.2d 514). The District of Columbia has also recognized the tort (*In re Ingersoll Trust* (D.C. 2008) 950 A.2d 672).

8 See, e.g., *Barclay v. Castruccio* (Md. 2020) 230 A.3d 80; *Wellin v. Wellin* (D.S.C. 2015) 135 F.Supp.3d 502 (apparently finding IIEI available under South Carolina law); but see *Malloy v. Thompson* (S.C. 2014) 762 S.E.2d 690, 692, in which the South Carolina Supreme Court states that it is neither "adopting or rejecting the tort of intentional interference with inheritance." See also *Garruto v. Cannici* (N.J.Super. 2007) 936 A.2d 1015, 1021 (declining to recognize independent cause of action for IIEI where probate remedy not pursued but suggesting "it may be recognized in other circumstances").

9 Rest.3d Torts, section 19.

10 States that have declined to recognize tortious interference with expectancy of inheritance include: Alabama (*Fitzpatrick v. Hoehn* (Ala. 2018) 262 So. 3d 613); Arkansas (*Jackson v. Kelly* (2001) 345 Ark. 151); Kansas (*Axe v. Wilson* (Kan. 1939) 150 Kan. 794); Maryland (*Anderson v. Meadowcroft* (Md. 1995) 661 A.2d 726); Montana (*Scottrade, Inc. v. Davenport* (D.Mont. 2012) 873 F.Supp. 2d 1306); Nebraska (*Manon v. Orr* (Neb. 2014) 856 N.W.2d 106); Nevada (*Balestra-Leigh v. Balestra* (9th Cir. 2012) 471 Fed.Appx. 636) (nonpub. opn.); New York (*Vogt v. Witmeyer* (N.Y.App.Div. 1995) 622 N.Y.S.2d 393); Rhode Island (*Umsted v. Umsted* (1st Cir. 2006) 446 F.3d 17); South Carolina (*Douglass ex rel. Louthian v. Boyce* (S.C.Ct. App. 1999) 519 S.E.2d 802); South Dakota (*Matter of Certification of Question of Law From United States District Court, District of South Dakota, Southern Division* (S.D. 2019) 931 N.W.2d 510); Tennessee (*Stewart v. Sewell* (Tenn. 2007) 215 S.W.3d 815; Virginia (*Economopoulos v. Kolaitis* (Va. 2000) 528 S.E.2d 714).

11 States that previously recognized tortious interference with expectancy of inheritance, but subsequently issued decisions apparently reversing or significantly curtailing that recognition include: Connecticut (*Moore v. Brower* (Conn.Super.Ct. July 26, 2006 No. X10UWYCV054010227S) 2006 WL 2411382); Delaware (*Moore v. Graybeal* (Del. 1988) 550 A.2d 35 (unpub.)); Georgia (*Copelan v. Copelan* (Ga.Ct.App. 2003) 583 S.E. 2d 562); Idaho (*Losser v. Bradstreet* (Idaho 2008) 183 P.3d 758); Iowa (*Youngblut v. Youngblut* (Iowa 2020) 945 N.W.2d 25); Kentucky (*Dickson v. Shook* (Ky. Ct. App. 2019) 2019 WL 1412497, rev. den. and opn. ordered nonpub. Feb. 12, 2020); Michigan (*Dickshott v. Angelocci* (Mich.Ct.App. June 17, 2004 No. 241722) 2004 Mich. App. Lexis 1691); Texas (*Archer v. Anderson* (Tex. 2018) 556 S.W.3d 228).

12 *Marshall v. Marshall* (2006) 547 U.S. 293, 312.

13 Civ. Code, section 22.2.

14 *Hickman v. Alpaugh* (1862) 21 Cal. 225, 226.

15 Rest.2d Torts, section 774B; see also Rest.3d Restitution and Unjust Enrichment, section 46(1) ("If assets that would otherwise have passed by donative transfer to the claimant are diverted to another recipient by fraud, duress, undue influence, or other intentional misconduct, the recipient is liable to the claimant for unjust enrichment. The misconduct that invalidates the transfer to the recipient may be the act of the recipient or of a third person.").

16 *In re Radovich's Estate* (1957) 48 Cal.2d 116, 120.

17 See Civ. Code, section 3523 ("For every wrong there is a remedy"), which is California's codification of the latin maxim *ubi jus, ibi remedium* (where there is a right, there is a remedy). As William Blackstone put the principle, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy." 3 Blackstone, Commentaries 23.

18 See, e.g., *Harmon v. Harmon* (Me. 1979) 404 A. 2d 1020.

19 See, e.g., *Plimpton v. Gerrard* (Me. 1995) 668 A.2d 882 (settlor induced to give away real estate and reserve a life estate for defendant); see also *Peralta v. Peralta* (N.M.Ct.App. 2005) 131 P.3d 81; *Estate of Jeziorski v. Tomera* (Ill.App. 1987) 516 N.E.2d 422; *Hadley v. Cowen* (Wash.App. 1991) 804 P.2d 1271 (settlement of will contest that resolved "all existing disputes" between parties precluded subsequent action for tortious interference).

20 This situation was in play in both *Beckwith* and *Gomez*, in both of which a third party's conduct allegedly prevented the execution of a document that could have provided standing for an action in probate; see also Rest.2d Torts, section 774B, com. (b); see also *Nemeth v. Banhalmi* (Ill.App. 1981) 425 N.E.2d 1187*; Ransdel v. Moore* (Ind. 1899) 53 N.E. 767; *Latham v. Father Divine* (N.Y. 1949) 85 N.E.2d 168. IIEI may be particularly necessary where the plaintiff would not be an intestate heir and no prior instrument benefits the plaintiff. (*Bohannon v. Wachovia Bank & Trust Co.* (N.C. 1936) 188 S.E. 390.) This rationale may also pertain where the plaintiff would take in intestacy, but less than expected. (*Allen v. Leybourne* (Fla.App. 1966) 190 So.2d 825.)

21 See, e.g., *Schilling v. Herrera* (Fla. 2007) 952 So. 2d 1231.

22 See, e.g., *Estate of Ellis* (Ill. 2009) 923 N.E.2d 237.

23 See, e.g. *Mitchell v. Langley* (1915) 143 Ga. 827 (insurance policy); *Watts v. Haun* (Fla.App. 1981) 393 So.2d 54 (endorsed bank stocks).

24 "The tort is probably the only remedy available where the plaintiff is denied an inheritance or gift by a defendant who does not actually receive the property. For example, if the testator is living with his

caretaker daughter, and her caretaker husband causes the testator to benefit the daughter, she cannot be sued for conversion, etc., and the husband is the proper defendant. In other situations, such as gifts or inheritances to a charitable organization, it is difficult to bring suit against "innocent" third parties; this could occur where a wealthy sibling sees to it that the runt of the family (and himself) gets left out by talking the parent into a charitable plan." Curtis E. Shirley, *Tortious Interference with an Expectancy* (May 2015) at p. 3 <https://www.shirleylaw.net/images/ArticlesOfInterestAttorneys/ArticleonTortiousInterferencewithanExpectancy5-13-15.pdf>.

25 Goldberg and Sitkoff, *Torts and Estates: Remedy Wrongful Interference With Inheritance* (2013) 65 Stan. L.Rev. 335, 338.

26 *Id.* at pp. 349-355.

27 *Id.* at p. 365.

28 *Id.* at pp. 396-397; similar concerns are raised in *Beckwith* and *Munn*.

29 *In re Silva's Estate* (1915) 169 Cal. 116; *Brazil v. Silva* (1919) 181 Cal. 490, disapproved in *Ludwicki v. Guerin* (1961) 57 Cal.2d 127, 133.

30 *Caldwell v. Taylor* (1933) 218 Cal. 471.

31 *In re Legeas* (1989) 258 Cal.Rptr. 858, previously published at 210 Cal. App.3d 385, review den. and opn. ordered nonpub. July 27, 1989.

32 See, e.g., *Csibi v. Fustos* (9th Cir. 1982) 670 F.2d 134; *Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168; *In re Estate of Gobel* (Cal. App. Dec. 8, 2004) 2004 WL 2810227 (nonpub. opn.).

33 *Munn v. Briggs* (2010) 185 Cal.App.4th 578.

34 *Beckwith, supra,* 205 Cal.App.4th at p. 1046.

35 *Ibid.*

36 *Id.* at p. 1047.

37 *Ibid.*

38 *Id.* at pp. 1047-1048.

39 *Id.* at p. 1048.

40 *Ibid.*

41 *Id.* at pp. 1048-1049.

42 *Beckwith, supra,* 205 Cal.App.4th at pp. 1052, 1056.

43 Streisand, 18 Cal. Tr. & Est. Q., *supra,* at p. 7.

44 *Beckwith, supra,* at pp. 1057-1059; Restatement of Torts (Third), section 19.

45 *Beckwith, supra,* at p. 1059.

46 *Id.* at pp. 1059, 1069.

47 Mot. for Summary Judgment-Defendant (March 11, 2013) at p. 1, *Beckwith v. Dahl* (No. 30-2010-00394872).

48 *Id.* at pp.1-2.

49 *Id.* at p. 12.

50 *Ibid.*

51 *Ibid.*

52 *Ibid.*

53 *Gomez v. Smith, supra*, 54 Cal.App.5th at p. 1019.

54 *Ibid.*

55 *Id.* at pp. 1019, 1034.

56 *Gomez v. Smith, supra*, 54 Cal.App.5th at p. 1019.

57 *Id.* at pp. 1019-1020, 1045.

58 *Id.* at pp. 1027-1037.

59 *Beckwith, supra*, 205 Cal.App.4th at p. 1059.

60 *Id.* at p. 1057.

61 Rest.3d Torts, section 19(1)(a).

62 Goldberg & Sitkoff, *supra,* 65 Stan. L. Rev. at p. 342, citing *In re Estate of Henry* (Ill.App.Ct. 2009) 919 N.E.2d 33, 40.

63 See, e.g., *Hooker v. Hooker* (Conn. 1943) 32 A.2d 68.

64 See *Youst v. Longo* (1987) 43 Cal.3d 64, 71, describing the requirement of showing "the *probability* of future economic benefit" in establishing tortious interference with prospective economic advantage. "Although varying language has been used to express this threshold requirement, the cases generally agree that it must be reasonably probable the prospective economic advantage would have been realized but for defendant's interference."

65 *Gomez, supra*, 54 Cal.App.5th at p. 1027.

66 *Newson v. Estate of Haythorn* (Ind.App. 1954) 122 N.E.2d 149.

67 *Davison v. Feuerherd* (Fla.App. 1980) 391 So.2d 799, 800.

68 *Cooke v. Cooke* (Fla.App. 1973) 278 So.2d 683, 684, but see *Holt v. First National Bank* (Ala. 1982) 418 So.2d 77, 80 (requiring written evidence of expectancy).

69 Rest.2d Torts, section 774B, com. (b) (defining "inheritance" as "any devise or bequest that would have otherwise have been made under a testamentary instrument, or any property that would have passed to the plaintiff by intestate succession"); see also *Robinson v. First State Bank of Monticello* (Ill.App. 1982) 433 N.E.2d 285, 291, rev'd *Robinson v. First State Bank of Monticello* (Ill. 1983) 454 N.E.2d 288, 293-294.

70 *Morrill v. Morrill* (Me. 1996) 679 A.2d 519.

71 *Beckwith, supra*, 205 Cal.App.4th at p. 1057, citing *Plimpton v. Gerrard* (Me. 1995) 688 A.2d 882, 886.

72 Rest.3d Torts, section 19(1)(c).

73 *Beckwith, supra*, at p. 1057.

74 *Beckwith, supra*, 205 Cal.App.4th at pp. 1057-1058.

75 *Id.* at p. 1058 (emphasis added).

76 Streisand, *supra,* 18 Cal. Tr. & Est.Q no. 3, at p. 5.

77 *Gomez, supra*, 54 Cal.App.5th at p. 1029.

78 See, e.g., *Allen v. Hall* (Or. 1999) 974 P.2d 199 (defendant interfered with settlor's attempts to change a will by falsely telling the estate planner the settlor lacked capacity.)

79 See, e.g., *Schilling v. Herrera* (Fla.Dist.Ct.App. 2007) 952 So.2d 1231.

80 See, e.g., *Cardenas v. Schober* (Pa.Super. Ct. 2001) 783 A.2d 317, 326.

81 *Beckwith, supra*,, 205 Cal.App.4th at p. 1057.

82 Rest.3d Torts, section 19(1)(b).

83 Rest.3d Torts, section, 19, com. b.

84 Rest.2d Torts, section 774B, com. c.

85 *Allen v. Hall* (Or. 1999) 974 P.2d 199, 204, cited in Gomez, *supra*, 54 Cal.App.5th at pp. 1035-1036.

86 *Gomez, supra,* at p. 1032.

87 *Allen v. Hall, supra* 974 P.2d 199.

88 *Lowe Foundation v. Northern Trust Co.* (Ill.App. 1951) 96 N.E.2d 831.

89 *Marshall v. DeHaven* (Pa. 1904) 58 A. 141.

90 *Ross v. Wright* (Mass. 1934) 190 N.E. 514.

91 *Beckwith*, *supra*, 205 Cal.App.4th at p. 1059. ("Beckwith did not allege Dahl directed any independently tortious conduct at MacGinnis. The only wrongful conduct alleged in Beckwith's complaint was Dahl's false promise to him. Accordingly, Beckwith's complaint failed to sufficiently allege the IIEI tort.")

92 *Gomez, supra*, 54 Cal.App.5th at pp. 1031-1036.

93 "Undue influence consists: 1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; 2. In taking an unfair advantage of another's weakness of mind; or, 3. In taking a grossly oppressive and unfair advantage of another's necessities or distress." Civ. Code, section 1575.

94 *Gomez, supra*, at p. 1033.

95 *Ibid.*

96 "An attorney-in-fact has a duty to act solely in the interest of the principal and to avoid conflicts of interest." Prob. Code, section 4232(a).

97 *Gomez, supra*, 54 Cal.App.5th at p. 1035.

98 *Beckwith, supra* 205 Cal.App.4th at p. 1057, citing Rest.2d Torts, section 774B, com. d, p. 59.

99 Rest.3d Torts, section 19(1)(d).

100 Rest.2d Torts, section 774B, com. d, p. 59.

101 *Ibid.*

102 *Ibid*.

103 Rest.2d Torts, section 774B, reporter's note (d).

104 *Butcher v. McClain* (Or.App. 2011) 260 P.3d 611; see also, *Labonte v. Giordano* (Mass. 1997) 687 N.E.2d 1253 and *Whalen v. Prosser* (Fla. Dist.Ct.App. 1998) 719 So.2d 2.

105 *Harmon v. Harmon, supra,* 404 A.2d 1020.

106 *Gomez, supra*, 54 Cal.App.5th at p. 1029.

107 *Beckwith, supra*, 205 Cal.App.4th at p. 1057.

108 Rest.3d Torts, section 19(1)(e).

109 Rest.3d Torts, section 19, com. f, citing to Rest.3d Restitution and Unjust Enrichment, section 46.

110 *Gomez, supra*, 54 Cal.App.5th at p. 1044.

111 Rest.3d Torts, section 19(2).

112 *Beckwith, supra*, 205 Cal.App.4th at p. 1053.

113 *Id.* at p. 1052.

114 *Gianella v. Gianella* (Mo.App.E.D. 2007) 234 S.W. 3d 526, 530, citing *Brown v. Kirkham* (Mo.App.W.D. 2000) 23 S.W.3d 880, 885.

115 *Huffey v. Lea* (Iowa 1992) 491 N.W.2d 518.

116 *Ibid.*

117 As in both *Beckwith* and *Gomez*, courts have found a plaintiff has standing where the plaintiff would have had standing to pursue remedies in probate but for the defendant's wrongful conduct in defeating or preventing the execution of an instrument through which the plaintiff would have been an interested party.

118 See *Harmon*, *supra,* 404 A.2d 1020. In *Harmon*, the court allowed an IIEI action to go forward while the settlor was still alive in a situation where there was a reasonable concern that evidence of conversion of estate property would be lost. The plaintiff would have lacked standing to seek such relief in probate while the settlor was alive.

119 See *Peralta, supra,* 131 P.3d 81. In *Peralta*, the settlor's will had bequeathed her estate to her three children in equal shares. Two of the children induced their mother to transfer real property to them, name them pay-on-death beneficiaries of certain bank accounts, and then execute a codicil cutting their sibling out of the will. The trial court dismissed the wronged sibling's IIEI suit because she could have filed a will contest, but the appellate court reversed on grounds that the estate had been too depleted to allow adequate probate remedy.

120 See *Schilling, supra,* 952 So.2d 1231. In *Schilling*, the settlor had executed a will leaving her entire estate to her brother. The settlor subsequently became entirely dependent on a nurse, during which time the settlor executed a new will revoking the earlier will and giving everything to the nurse. When the settlor died, the nurse concealed the fact from the brother and probated the later will. The brother only found out after the court had entered its final order closing probate. The trial court dismissed the brother's IIEI claim on grounds that a will contest would have been available, but the appellate court reversed on grounds that the brother had been deprived of a "fair opportunity to pursue" probate remedies.

121 See *Ellis, supra,* 923 N.E.2d 237. In *Ellis*, a settlor executed will in 1964 naming the Shriners as beneficiary and another will in 1999 naming her pastor as beneficiary. After the settlor's death, the 1999 will was probated and the Shriners only learned of the 1964 will three years later. The Shriners filed a will contest based on undue influence and fraud as well as an IIEI claim. Whereas the trial and appellate courts held that all claims were barred by the limitations period for a will contest, the Illinois Supreme Court reversed as to the IIEI claim, holding that a tort is not a will contest.

122 See *Munn, supra,* 185 Cal.App.4th 578. In *Munn*, a sibling claimed that two other siblings had unduly influenced the mother to execute a codicil giving $1 million gifts to their own children but not to the child of the first sibling. However, the first sibling refrained from filing a will contest because of the codicil's no-contest clause. At trial, the first sibling argued that this no-contest clause deprived him of an adequate probate remedy because it "suppressed any challenge to the Codicil in the probate action." The Fourth District disagreed, holding that if the presence of the potential operation of a no-contest clause were

sufficient to establish inadequate probate remedy, "we not only would undermine the important public policies served by no contest clauses, we would all but eliminate 'will contests' in probate to the extent the testamentary documents contained a no contest clause." *Id.* at p. 592.

123 *Keith v. Dooley* (Ind.Ct.App. 2004) 802 N.E.2d 54, 58. In *Keith*, the court determined that nieces and nephews had an adequate probate remedy when a successful will contest would have resulted in them receiving the bulk of the decedent's estate in intestacy. The court therefore dismissed an IIEI tort action the nieces and nephews filed while the will contest was pending on grounds that the remedies available in the will contest and the tort action were "substantially the same."

124 *Minton, supra,* 671 N.E.2d at p. 163. In *Minton*, the plaintiff filed an IIEI complaint against her brother, alleging that he had interfered with her expectancy under their mother's will. She claimed a right to punitive damages on the basis of the brother's fraud, duress, undue influence, conversion and unjust enrichment, and that probate remedies were therefore inadequate. The court, in rejecting this argument, held that the plaintiff had a right to seek damages through a will contest and should not be allowed a "second bite at the apple."

125 *DeWitt, supra*, 408 So.2d at p. 220. In *DeWitt*, the court found that the plaintiffs had had a fair opportunity to challenge the subsequent will and attempt to establish a prior will favorable to them. "If they had succeeded in this challenge and established this earlier will, the probate court could have given them everything to which they claim entitlement."