

RECOGNITION AND ESTABLISHMENT OF A CONTROVERSIAL TORT IN TEXAS: TORTIOUS INTERFERENCE WITH INHERITANCE OR GIFT

Comment

by Lindsay Nichols

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I. INTRODUCTION

When Anna Nicole Smith first pursued a legal action against her stepson, E. Pierce Marshall, she was unaware that she began new era of discussing how an old tort should be employed.¹ The cause of action that created this

1. See generally *In re Marshall*, 275 B.R. 5, 8 (C.D. Cal. 2002). Note that this case is no longer good law. See *id.* Nevertheless, the court’s decision regarding tortious interference with gift and its application of Texas law is still good authority. See generally *id.* The controversy that caused this decision to be overturned

controversy and caught the nation's attention is known as tortious interference with inheritance or, as in Anna Nicole Smith's case, gift.² Even though the California Bankruptcy Court decided Anna Nicole Smith's case, the court made its decision by using and interpreting Texas law.³ Therefore, the case and its results could arguably impact Texas and similar states.

Texas first recognized the tort of interference with inheritance in 1987 failed to discuss details of the tort, such as what elements constituted the tort.⁴ Since 1987, several Texas courts have recognized tortious interference with inheritance but have failed to establish when, where, and how the tort should be used and who should be allowed to exercise the ability to raise the tort.⁵ Additionally, Texas has only recently acknowledged tortious interference with gift.⁶ Therefore, even though the tort is referred to as tortious interference with inheritance or gift, there is still controversy over whether the tort is truly a legal cause of action in Texas.⁷ Fueling the debate of whether tortious interference with inheritance or gift is a legal cause of action in Texas is the fact that the Texas legislature fails to address the issue of what constitutes tortious interference with inheritance or gift.⁸ With no statutory legal authority to turn to, lawyers and courts across Texas are likely unsure about the extent and limitations to tortious interference with inheritance or gift claims. Therefore, courts have taken liberties to establish the scope of the tort.⁹

This comment sheds light on the debated issue of tortious interference with inheritance or gift by explaining the tort and offering opinions of whether the tort should be a legal cause of action in Texas. The next section, Part I of this comment, is a basic explanation of tortious interference.¹⁰ This includes a definition, an explanation of the differences between the tort and contesting a will, and the policy behind the tort. Part II discusses general circumstances under which one may raise the tort and issues that may arise when trying to raise a tortious interference claim.¹¹ Part III reviews Texas's recognition of tortious interference with inheritance or gift and demonstrates the courts' and

was based on whether the California Bankruptcy Court had the jurisdiction over this issue, not whether the court's application of the law was incorrect. *See generally id.*

2. *See generally id.* at 51–53.

3. *See generally id.* at 50.

4. *See King v. Acker*, 725 S.W.2d 750, 754 (Tex. App.—Houston [1st] 1987).

5. *See generally* 10 TEX. PRAC., TEXAS LAW OF WILLS § 52.44 (3d. ed.).

6. *See Marshall*, 275 B.R. at 51.

7. *See* 10 TEX. PRAC. § 52.44.

8. *See* 10 TEX. PRAC. § 52.44.

9. *See generally King*, 725 S.W.2d 750; *Neill v. Yett*, 746 S.W.2d 32 (Tex. App.—Austin 1988, writ denied); *Thompson v. Deloitte & Touche, L.L.P.*, 902 S.W.2d 13 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Brandes v. Rice Trust, Inc.*, 966 S.W.2d 144 (Tex. App.—Houston [14th] 1998, pet. denied); *Marshall*, 275 B.R. 5; *Urbanczyk v. Urbanczyk*, 278 S.W.3d 829, 835 (Tex. App.—Amarillo 2009, no pet.); *In re Estate of Russell*, 311 S.W.3d 528 (Tex. App.—El Paso 2009, no pet.); *Haisler v. Coburn*, No. 10-09-00275-CV, 2010 WL 2953372, at *1 (Tex. App.—Waco July 28, 2010, pet. denied).

10. *See infra* Part I.

11. *See infra* Part II.

legislature's view of the tort.¹² Damages that may be recognized under the claim will be discussed in Part IV of this comment.¹³ Finally, Part V proposes whether this tort should be officially recognized as a legal cause of action in Texas and discusses the most effective way to implement a law regarding the tort.¹⁴ Ultimately, this comment demonstrates the controversy created by not having a definite law in Texas regarding tortious interference with inheritance or gift and determines whether the tort should be officially enacted in Texas.

II. TORTIOUS INTERFERENCE WITH INHERITANCE OR GIFT—AN OVERVIEW

There are often situations in which an heir believes he was wrongfully left out of a will or did not receive gifts he was allegedly promised or expected. When these situations arise, people often file will contests to fight for items or legacy, which they believe they are lawfully entitled to.¹⁵ Unfortunately, not everyone is entitled to file a will contest.¹⁶ Typically, only “interested parties” may file a will contest.¹⁷ Beneficiaries related to the testator or those named in a prior will instrument are generally the only people that fall under this classification.¹⁸ Therefore, courts have begun to recognize tortious interference with inheritance or gift as an alternative remedy for those unable to contest a will.¹⁹ This legal action “provides a plaintiff with the opportunity to recover for the loss of [an] expectancy if the defendant’s tortious act deprives the plaintiff of an expected inheritance, benefit under a will, at-death benefit, or inter vivos gift” that is outside of the probate court.²⁰

Across the country, probate courts are representative of “one of the last remaining legal spaces primarily concerned with determinations of status” and resistant to move away from a status driven field to one that is contract driven.²¹ Perhaps this is why, until recently, the majority of civil courts only recognized a tort action for “intentional interference with commercial contractual relations,” as defined by the Restatement of Torts.²² Intentional interference with

12. See *infra* Part III.

13. See *infra* Part IV.

14. See *infra* Part V.

15. See Diane J. Klein, *The Disappointed Heir’s Revenge, Southern Style: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Fifth and Eleventh Circuits*, 55 BAYLOR L. REV. 79, 82 (2003) (hereinafter “*Disappointed Heir’s Revenge, Southern Style*”).

16. See *id.*

17. See *id.*

18. *Id.*

19. *Id.* at 83.

20. Irene D. Johnson, *Tortious Interference with Expectancy of Inheritance or Gift Suggestions for Resort to the Tort*, 39 U. TOL. L. REV. 769, 770 (2008).

21. Diane J. Klein, “*Go West, Disappointed Heir*”: *Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Pacific States*, 13:1 LEWIS & CLARK L. REV. 209, 211–12 (2009) (hereinafter “*Go West, Disappointed Heir*”).

22. RESTATEMENT (SECOND) OF TORTS § 767 (1997). The factors considered include: “(a) the nature of the actor’s conduct, (b) the actor’s motive, (c) the interests of the other with which the actor’s conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom

commercial relations is the original tortious interference claim, which has been extended to non-commercial expectancies such as tortious interference with inheritance or gift.²³ In 1987, Texas courts first adopted the definition of tortious interference with inheritance or gift offered in the Restatement of Torts.²⁴ The restatement provides, “[o]ne who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.”²⁵ In other words, tortious interference with inheritance or gift is “the *wrongful* interference with an inheritance (or legacy, *inter vivos* gift, or interest in trust) that another would have received, but for that interference.”²⁶ As tortious interference with inheritance or gift became better recognized as a cause of action, the American Law Reports (A.L.R.) and several courts have determined five elements that generally must be established to raise the claim: (1) the existence of the expectancy; (2) intentional interference with the expectancy; (3) tortious conduct such as fraud, duress, or undue influence; (4) reasonable certainty that the plaintiff would have received the expectancy if the defendant had not interfered; and (5) resulting damages.²⁷ A plaintiff should establish each of these elements; otherwise, a plaintiff risks the failure of a tortious interference with inheritance or gift claim.²⁸

Many people may wonder why a person would file a tortious interference with inheritance or gift claim when probate options are available.²⁹ While it may be difficult to conceptualize at first, major differences exist between filing for the tort and probate.³⁰ To begin, “federal district courts have jurisdiction over the [tort] claims instead of a probate court,” which often hears claims regarding the estate.³¹ Likely, this distinction is created because the tort claim

of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor’s conduct to the interference and (g) the relations between the parties.” *Id.*; see David L. Drechsler, *Tortious Interference with an Expectancy of an Inheritance*, 1 OHIO TORT L.J. 81 (2006) (explaining, “[i]ntentional interference with an expectancy of an inheritance derives from the more common tort of intentional interference with a contract or prospective business relationship”). See generally, Steven K. Mignogan, *On the Brink of Tortious Interference with Inheritance*, <http://www.archerlaw.com/files/articles/interfere.html> (last visited Sept. 21, 2011).

23. Mark R. Siegel, *Unduly Influenced Trust Revocations*, 40 DUQ. L. REV. 241, 256-57 (2002). See Marilyn Marmai, *Tortious Interference with Inheritance: Primary Remedy or Last Recourse*, 5 CONN. PROB. L.J. 295, 296 (1991) (explaining that “[t]he courts drew on the rationale of tortious interference with business interests . . . in developing the cause of action for tortious interference with inheritance.” *Id.*).

24. See *King*, 725 S.W.2d at 754; *Haisler*, 2010 WL 2953372, at *3; RESTATEMENT (SECOND) OF TORTS § 774B (1979).

25. RESTATEMENT (SECOND) OF TORTS § 774B (1979).

26. “*Go West, Disappointed Heir*,” *supra* note 21, at 212.

27. *Marshall*, 275 B.R. at 51; Drechsler, *supra* note 22; *Disappointed Heir’s Revenge, Southern Style*, *supra* note 15, at 84; James A. Fassold, *Tortious Interference with Expectancy of Inheritance: New Tort, New Trap*, <http://www.grayfassold.com/articles/expectancy.htm> (last visited Oct. 9, 2011).

28. See Johnson, *supra* note 20, at 771.

29. See generally Drechsler, *supra* note 22.

30. See Johnson, *supra* note 20, at 772.

31. Drechsler, *supra* note 22.

does not involve a “purely probate matter.”³² Probate’s focus is generally the administration of the estate and emphasizes determining the intent of the testator, while the purpose of the tort claim is to provide relief to the plaintiff who lost his inheritance or gift because of tortious conduct.³³ Additionally, the results of the respective proceedings differ.³⁴ A tort action often results in the defendant paying from their personal assets, and probate results in a ruling regarding the distribution of the testator’s estate.³⁵ The last notable difference between a tort action and a probate proceeding is the standard of proof required.³⁶ In a probate proceeding, the standard of proof is higher and is often “established with the testimony of two credible disinterested witnesses.”³⁷ On the other hand, the standard of proof for a tort action only requires a preponderance of the evidence.³⁸ Because of these differing standards of proof, “[i]t is possible that a will lacking adequate proof in probate . . . could be established in tort because of the lesser standard of proof.”³⁹ This idea demonstrates that there may be more flexibility in raising a tortious interference with inheritance or gift claim, which creates an incentive to raise the tortious interference claim rather than bringing a cause of action in probate court.⁴⁰

With different goals and standard of review than probate, tortious interference allows for better-tailored relief when someone commits a tort; however, the time and litigation expenses should be considered when determining whether or not this tort should be allowed in any state.⁴¹ Additionally, since the Anna Nicole Smith case, this old cause of action is frequently pursued.⁴² However, with the seemingly increased number of legal pursuits, new questions of how and when the tort should be employed are raised.⁴³

III. CIRCUMSTANCES UNDER WHICH ONE MAY RAISE THE TORT

Any tort claim appears straight forward, seeming to allow only one way for courts to adopt and implement the law in any given state. However, if two courts potentially have jurisdiction over one case, issues arise when determining which court has priority over the case.⁴⁴ Therefore, the scope of

32. Drechsler, *supra* note 22.

33. Drechsler, *supra* note 22. See Johnson, *supra* note 20, at 771.

34. See Johnson, *supra* note 20, at 771.

35. See Johnson, *supra* note 20, at 771.

36. See Johnson, *supra* note 20, at 773.

37. See Johnson, *supra* note 20, at 773.

38. See Johnson, *supra* note 20, at 773.

39. See Johnson, *supra* note 20, at 773.

40. See generally *Disappointed Heir’s Revenge, Southern Style*, *supra* note 15, at 156.

41. See Johnson, *supra* note 20, at 772.

42. See generally *Urbanczyk*, 278 S.W.3d at 835; *Estate of Russell*, 311 S.W.3d at 528; *Haisler*, 2010 WL 2953372, at *1.

43. See discussion *infra* Part IV.B.2.b–d.

44. See generally *Go West, Disappointed Heir*, *supra* note 21, at 211–12.

tortious interference with inheritance or gift claims as a remedy must be established. Particularly, the circumstances under which a person may raise the claim must be established in order to determine issues such as which court has priority over a claim.

The discussion of when a person may raise the tort begins with a hypothetical. Suppose the Dollars, a family of four, had a steady relationship with the father's grandmother, the children's great-grandmother. The Dollars frequently spoke with their grandmother on the phone and visited her occasionally each year. Approximately every five years, the Dollars' grandmother altered her will; yet, the grandmother's grandson and two great-grandchildren were consistently beneficiaries under the will. When the grandmother was ninety-five years old, sick with cancer and other illnesses, she decided to fire her old attorney, who was also a long-time friend, and hire a new attorney to conduct various legal work for her. About this time, distant relatives to the Dollars' grandmother, the Blacks, entered the grandmother's life. The Blacks then proceeded to stay at the grandmother's home and told the new lawyer that they were to be the sole beneficiaries to the grandmother's estate. Despite actions taken by the grandmother that demonstrated that she did not want a new will drafted, the Blacks and the new attorney manipulated the grandmother into signing a will. This will removed her great-grandchildren as beneficiaries; significantly reduced her grandson's share, and it made the Blacks primary beneficiaries under the will. The grandmother passed away four days later. Once the will was admitted for probate, the new and shocking changes were revealed, and the great-grandchildren decided to contest the will. Midway through the will contest, a settlement agreement was proposed, but the great-grandchildren continued to believe that the Blacks and the new attorney, who billed for over \$1 million in attorney's fees in one year, were unjustly enriched and that the probate court's remedies were not and would not be satisfactory. The great-grandchildren believed that the actions taken by the Blacks and the new attorney constituted a tort.

In situations such that this, the law across the United States is unsettled and varies from state to state as to the appropriate measures to take.⁴⁵ As noted earlier, allowing a tort claim when probate remedies are unsatisfactory enables a larger number of individuals to challenge wills because the person raising the tort does not have to be an intestate heir or a beneficiary in the testator's other wills.⁴⁶ With an endless number of people allowed to file a claim under tortious interference with inheritance or gift, there must be some limitation as to who may raise the tort and under what circumstances one may raise the tort, while enabling individuals to take advantage of the remedies available under the tort claim.

45. Rachel A. Orr, *Intentional Interference with an Expected Inheritance: The Only Valid Expectancy for Arkansas Heirs is to Expect Nothing*, 64 ARK. L. REV. 747, 751–53 (2011) (explaining that jurisdictions vary regarding when it is appropriate to recognize tortious interference claims).

46. See *Disappointed Heir's Revenge*, *Southern Style*, *supra* note 15, at 91.

A. *Tortious Interference as a Secondary, Back-Up Remedy*

In order to establish some limitation, arguments have been made that tortious interference with inheritance or gift is “a secondary or back-up remedy, only to be used when . . . the probate court remedy would be inadequate.”⁴⁷ States that view tortious interference as a “back-up remedy” recognize the tort only if the person raising the claim has exercised “exhaustion of probate court remedies or demonstration of their inadequacy.”⁴⁸ In some of these jurisdictions, if a plaintiff could have contested the will in probate court, but failed to do so, the plaintiff could be prohibited from relief under the tort.⁴⁹ Additionally, these jurisdictions prevent a person from double recovery; a person may either recover through the probate court or through a tortious interference claim, not both.⁵⁰ The majority of the states, including Texas, use a form of the “back-up remedy” approach to tortious interference with inheritance or gift.⁵¹ However, there is still uncertainty as to whether this is how Texas courts should use the tort and whether these circumstances are the only ones in which the tort should be raised.⁵²

The Dollars and Blacks example may be helpful to illustrate the controversy with the “back-up remedy” approach. Even though the Dollars settled with the Blacks, the Dollars did not believe that they received everything they were entitled to. Because the Dollars, arguably, were successful under the probate court, a tortious interference with inheritance or gift claim is not a back-up remedy; there was not an unsuccessful probate attempt.⁵³ However, if the Blacks and the new attorney had not collaborated to exclude the great-grandchildren from the will, the Dollars would not have had to invest time and money into going to probate court, and may have received more under the will. Additionally, the probate court’s remedy did not impose any penalty on the Blacks or the new attorney for their tortious conduct. Therefore, there remains a question of even if one successfully contests a will, does a person still have the option of filing a tortious interference with inheritance or gift claim when the person considers the probate remedies inadequate.⁵⁴

While Texas law lacks authority regarding this issue, the neighboring state of New Mexico gave an opinion on the matter.⁵⁵ The court explained that factors such as “punitive damages and litigation costs . . . are not considered in

47. See *Disappointed Heir’s Revenge, Southern Style*, *supra* note 15, at 95.

48. See *Disappointed Heir’s Revenge, Southern Style*, *supra* note 15, at 91.

49. Orr, *supra* note 45, at 752.

50. See Bette B. Epstein, *New Causes of Action in Estate & Trust Litigation*, http://files.ali-aba.org/thumbs/datastorage/skoobesruoc/pdf/10EpsteinNew CausesofCH002_thumb.pdf (last visited Jan. 23, 2012).

51. See *Disappointed Heir’s Revenge, Southern Style*, *supra* note 15, at 97.

52. See *Disappointed Heir’s Revenge, Southern Style*, *supra* note 15, at 95.

53. See *Disappointed Heir’s Revenge, Southern Style*, *supra* note 15, at 95.

54. *Disappointed Heir’s Revenge, Southern Style*, *supra* note 15, at 95.

55. See *Wilson v. Fritschy*, 55 P.3d 997, 1005 (N.M. Ct. App. 2002).

determining whether probate remedies will be inadequate.”⁵⁶ The court reasoned that the plaintiffs would likely have been awarded attorney’s fees if the plaintiffs pursued a legal action in court.⁵⁷ Additionally, the court explained that punitive damages are not meant to compensate the plaintiff.⁵⁸ Therefore, the plaintiff should not argue that the probate remedy was inadequate because the probate remedy did grant the plaintiff with what he believed he was legally entitled to, even though the tortious conduct may have gone unpunished.⁵⁹

The opinion stated by the New Mexico court implies that one may only pursue a tortious interference claim if the plaintiff receives (1) a significantly disproportionate amount of the estate than what he would have received but for the interference or (2) nothing through the probate court process.⁶⁰ Additionally, the notion that punitive damages should result in order for a remedy to be sufficient may not be upheld because punitive damages are not part of the estate that the plaintiff would have received.⁶¹ Despite this opinion, some jurisdictions allow tortious interference claims even if there was a successful probate attempt.⁶²

B. *Tortious Interference as a Primary Remedy*

Rather than requiring plaintiffs to exhaust their probate remedies before pursuing a tortious interference with inheritance or gift claim, some jurisdictions allow a person to either file with the probate court for a will contest, raise a tortious interference claim, or utilize both approaches simultaneously.⁶³ Allowing a plaintiff to choose which course of action he would like to pursue enables tortious interference with inheritance or gift claims to be pursued as a primary remedy because “[a] plaintiff need not pursue any available probate remedy before instituting the tort suit.”⁶⁴ The courts’ reasoning for this approach turns on the idea that the tort “does not seek to set aside the will, but rather seeks a ruling against a particular defendant.”⁶⁵ Considering these differing goals, perhaps a plaintiff should be empowered to pursue a case in the probate and civil courts, independent of one another.

Allowing a plaintiff to pursue a tort action as a primary remedy seems to be a quality alternative to allowing a plaintiff to only pursue the tort after the plaintiff has exhausted his probate remedies. However, questions remain over

56. Jared S. Renfro, *Does Tennessee Need Another Tort? The Disappointed Heir in Tennessee and Tortious Interference with Expectancy of Inheritance or Gift*, 77 TEN. L. REV. 385, 397 (2010). See, e.g., *Wilson*, 55 P.3d at 1005–06.

57. *Wilson*, 55 P.3d at 1005 (showing how the parties settled as opposed to seeking judgment).

58. *Id.* at 1006.

59. See generally *id.* at 1004–05.

60. See *id.* at 1001.

61. See *id.* at 1006.

62. See *infra* Part III.B.

63. Epstein, *supra* note 50; Orr, *supra* note 45, at 752; see Marmai, *supra* note 23, at 302.

64. See Marmai, *supra* note 23, at 302.

65. Orr, *supra* note 45, at 752.

whether these actions should be allowed be pursued simultaneously, such as when an Illinois appellate court allowed a plaintiff to “allege both will contest and tortious interference, even where a successful will contest would provide complete relief.”⁶⁶ If a plaintiff could file actions simultaneously, as the Illinois appellate court explained, it may result in controversy because allowing a person to do so could result in double recovery.⁶⁷ Issues such as a double recovery controversy arising demonstrate that perhaps the legislature should establish a concrete law because without one, courts and lawyers will not know when to pursue the cause of action.

Because Texas has little case law recognizing tortious interference with inheritance or gift, situations such as this have not arisen and have yet to be addressed by Texas courts.⁶⁸ In addition to determining what situations are appropriate to raise the tort, it is also necessary to determine exactly who may raise the tort and what type of evidence constitutes a legitimate claim.

C. Tortious Interference and the Statute of Limitations

When determining whether and how one may raise a tortious interference with inheritance or gift claim, the appropriate statute of limitations must be taken into consideration. Imposition of a statute of limitations on the tort “has been deemed a question of statutory construction.”⁶⁹ Two views have dominated the debate on what the appropriate statute of limitations for this tort should be.⁷⁰ Some states impose the general tort statute of limitations for their respective state.⁷¹ Other states, however, “apply the same statute of limitations that would pertain to a will contest.”⁷²

In addition to these statute of limitations views, the statute of limitations issue has also been analyzed as running according to the testator’s lifetime.⁷³ For instance, some argue that the tort should be filed during the testator’s lifetime because the testator could take the stand and testify.⁷⁴ Others, however, argue that a plaintiff “must file the tort during the testator’s lifetime only when the defendant dies before the testator.”⁷⁵ These differing views create difficulty for courts to determine what the appropriate statute of limitations is, especially in states in which the legislature has not addressed this issue.⁷⁶ Additionally,

66. Epstein, *supra* note 50 (citing *In re Estate of Roeseler*, 679 N.E.2d 393 (Ill. App. Ct. 1997); *In re Estate of Knowlson*, 562 N.E.2d 277 (Ill. App. Ct. 1990)).

67. See Epstein, *supra* note 50.

68. *Haisler*, 2010 WL 2953372, at *3.

69. Orr, *supra* note 45, at 755.

70. Orr, *supra* note 45, at 755.

71. Orr, *supra* note 45, at 755.

72. Orr, *supra* note 45, at 755.

73. See Curtis E. Shirley, *Tortious Interference with an Expectancy*, 41 RES GESTAE 16, 19 (Oct. 1997).

74. See *id.* at 19.

75. See *id.*

76. See generally Orr, *supra* note 45, at 755 (explaining the controversy that exists among jurisdictions when imposing a statute of limitations).

whether the discovery rule applies to intentional interference with inheritance or gift claims fuels the controversy concerning the statute of limitations issue. While the tort may accrue when the defendant tortiously interferes with the plaintiff's inheritance, applying the discovery rule could save the claim.⁷⁷

The controversy surrounding how and when tortious interference with inheritance or gift should be pursued is evident. The debates that surround this claim are never-ending because jurisdictions seem unable to agree on how the tort should be employed.⁷⁸ Therefore, perhaps states' legislatures should step in and establish statutory law to guide courts in forming more uniform decisions regarding tortious interference and when it should be used. However, in order to conclude which rules are appropriate, it is necessary to analyze the rules that Texas courts have adopted thus far.

IV. DEVELOPMENT OF THE TORT IN TEXAS

While secondary sources help explain tortious interference, little case law in Texas exists regarding this issue. Nevertheless, over the years notable cases have begun to shape the tort and its limitations as it is recognized in Texas.⁷⁹ This section analyzes cases that have been particularly influential in how the tort is implemented in Texas.

A. *Initial Recognition of Tortious Interference with Inheritance—King v. Acker—1987*

Texas first recognized tortious interference with inheritance in 1987 with an opinion by the Houston Court of Appeals.⁸⁰ In this case, testator's children, Dahse and Jackson, and mother, Aline King, brought suit against the testator's attorney, the attorney's secretary, and a witness of a will dated January 4, 1982.⁸¹ The complaint alleged that the attorney was never granted power of attorney by the testator and that the 1982 will was forged.⁸² The suit continued to explain that if the documents had not been forged in 1982, then a "\$20,000 statutory commission for the sale of [a] stock . . . would not have been paid."⁸³ Plaintiffs hoped to recover for damages of tortious conduct that prevented the plaintiffs from their entire inheritance under the will dated June 13, 1977, which was ultimately probated because the 1982 will was found to be forged.⁸⁴

77. See Shirley, *supra* note 73, at 19.

78. See generally Orr, *supra* note 45, at 751–57.

79. See King, 725 S.W.2d at 750; Neill, 746 S.W.2d at 32; Thompson, 902 S.W.2d at 13; Brandes, 966 S.W.2d at 144; Marshall, 275 B.R. at 58; Haisler, 2010 WL 2953372, at *3.

80. King, 725 S.W.2d at 750; *Disappointed Heir's Revenge, Southern Style*, *supra* note 15, at 97.

81. King, 725 S.W.2d at 752.

82. *Id.*

83. *Id.*

84. See *id.*

In reaching its decision, the court looked to other states, which affirmatively held, “a cause of action exists where the actor interfered with the inheritance by [the] independent tortious conduct.”⁸⁵ Additionally, the court used the definition found in the restatement to gain a better understanding of the situations in which the rule applies.⁸⁶ Ultimately, the court determined that, “a cause of action for tortious interference with inheritance rights exists in Texas.”⁸⁷ However, the extent of the tort remained unclear.

B. *The Extent of the Tort*

After the decision in *King*, questions remained regarding whether the opinion recognizing cause of action for tortious interference with *inheritance* also extended and applied to tortious interference of *gift*.⁸⁸ Additionally, since the holding of this decision, the Texas legislature has failed to address the tort, explain what actions constitute tortious interference with inheritance or gift, or explain when the tort may be raised.⁸⁹ In fact, the only time the Texas Legislature addresses tortious interference with inheritance is when the statute explains what does *not* constitute tortious interference.⁹⁰ This minor acknowledgement of a distinction in the Probate Code, however, demonstrates that Texas recognizes tortious interference with inheritance because the need for a distinction between probate and filing a tort claim would not exist if the action did not exist.⁹¹

Because Texas courts recognize a cause of action for tortious interference with inheritance but the legislature fails to do so, several Texas courts address the tort, its applications, and the limitations that should be imposed in raising the tort.⁹² It is important to note, however, that while Texas courts recognize tortious interference with inheritance or gift, the majority of Texas courts fail to provide for recovery under the tort.⁹³

85. *Id.* at 754.

86. *Id.*

87. *Id.*

88. 9 TEX. PRAC., TEXAS LAW OF WILLS § 12.3 (3d ed.).

89. *See* 9 TEX. PRAC., TEXAS LAW OF WILLS § 12.3 (3d ed.) (explaining that the Texas Legislature has failed to address what *is* tortious interference with inheritance or gift); 10 TEX. PRAC., TEXAS LAW OF WILLS § 52.44 (3d ed.) (explaining that there are questions of whether tortious interference may be raised while the future testator is still alive; this issue has not been addressed by the Texas Legislature or Texas courts).

90. TEX. PROB. CODE ANN. § 10C(a) (West Supp. 2012) (stating, “[t]he filing or contesting in probate court of any pleading relating to a decedent’s estate does not constitute tortious interference with inheritance of the estate.”).

91. *See infra* part IV.C.

92. *See* GERRY W. BEYER, 9 TEX. PRAC., TEXAS LAW OF WILLS § 12.3 (3d ed. 2002).

93. *Disappointed Heir’s Revenge, Southern Style*, *supra* note 15, at 97.

1. “Historical” Cases Addressing the Tort

The following cases are classified as “historical” Texas cases that address tortious interference with inheritance or gift because the following cases were decided prior to *In re Marshall*.⁹⁴ In order to determine how and why the law of tortious interference with inheritance or gift later developed, it is necessary to evaluate how the tort began to develop in Texas prior to the *In re Marshall* decision.⁹⁵

a. Neill v. Yett—1988

One year after the *King v. Acker* decision, the Austin Court of Appeals failed to acknowledge whether tortious interference with inheritance was a legal cause of action.⁹⁶ In *Neil*, the testator passed away on May 8, 1981.⁹⁷ One month after the testator’s death, the county sheriff “posted notice of the application for probate . . . on June 8, 1981,” and “the will was later admitted for probate on July 9, 1981.”⁹⁸ Irmalee Neill, the testator’s granddaughter, filed a petition to set aside the probated will but did so three years after the will was admitted for probate.⁹⁹ Among other causes of action, Irmalee sought relief for tortious interference with inheritance “against her grandmother, the bank, and the attorneys.”¹⁰⁰ Under the tortious interference claim, however, Irmalee failed to elaborate on how she met the elements of tortious interference with inheritance.¹⁰¹ Additionally, even though Irmalee referenced the holding in *King v. Acker*, the court in *Neill* noted that *King* did not establish elements to evaluate whether tortious interference existed in a particular case.¹⁰²

Subsequently, the court in *Neill* failed to mention whether a cause of action for tortious interference with inheritance existed.¹⁰³ Despite its lack of recognition of the claim, the court implied “that failure to exhaust probate remedies is a bar to the tort suit, and that an unsuccessful probate result would collaterally estop the plaintiff from establishing an expectancy in the tort suit.”¹⁰⁴ Thus, a person must establish an inheritance expectancy by exhausting his probate remedies in order to pursue a tortious interference with inheritance or gift claim.

94. See generally *infra* Part IV.B.2.

95. See *infra* Part IV.B.2.

96. *Neill*, 746 S.W.2d at 35 (The court questions whether or not a cause of action for tortious interference even exists by stating, “[i]n any event and if, indeed, a cause of action for tortious interference with an ‘inheritance expectancy’ exists . . .” *id.*) (emphasis added).

97. *Id.* at 33.

98. *Id.*

99. *Id.*

100. *Id.* at 34.

101. *Id.* at 35.

102. *Id.*

103. *Id.*

104. *Disappointed Heir’s Revenge, Southern Style*, *supra* note 15, at 98–99.

b. *Thompson v. Deloitte & Touche, L.L.P.—1995*

In addition to the limits placed on the tort by *Neill*, the Houston Court of Appeals explained that a person cannot raise a tortious interference with inheritance or gift claim “in Texas for the lost opportunity to prevent someone from changing his will.”¹⁰⁵ In *Thompson v. Deloitte & Touche, L.L.P.*, the daughter and widow of the testator learned that the testator “secretly changed his will two months before his death” and that the testator’s accountants had helped him make the changes to his will.¹⁰⁶ When the testator’s widow and daughter filed this claim, they acknowledged that they were not contesting the will.¹⁰⁷ Rather, they alleged that tortious interference with inheritance existed because the accountants did not inform them that the testator planned to make changes to his will.¹⁰⁸ The daughter and widow explained that if they had known about the proposed changes, they would have prevented the testator from changing his will.¹⁰⁹ As stated above, however, the court determined that there is no injury to a person when they are unable to stop the testator from making a change to his will.¹¹⁰

c. *Brandes v. Rice Trust, Inc.—1988*

In *Brandes v. Rice Trust, Inc.*, the Houston Court of Appeals provided the last major “historical” restriction to the tort in Texas.¹¹¹ In this case, the testator’s sister, Marie Roy Brandes, and her three children filed a suit against William Marsh Rice University for tortious interference with inheritance because the testator, Dr. Max F. Roy, transferred \$4 million in municipal bonds to Rice four hours before Dr. Roy passed away.¹¹² However, evidence presented to the court reflected that the municipal bond transfer was a planned decision made in 1992.¹¹³ The testator’s will reflected the decision by providing Marie Roy Brandes with tangible personal property and assigning the rest of the testator’s assets to Rice.¹¹⁴ When analyzing this case, the court explained that Marie Roy Brandes had “no right of expectancy . . . because by the terms of [the] will, he did not leave them the municipal bonds.”¹¹⁵ Therefore, the court determined that “there is no claim for tortious interference with inheritance rights if the plaintiff would not have received the disputed

105. *Thompson*, 902 S.W.2d at 16.

106. *Id.* at 15.

107. *Id.* at 16.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Brandes*, 966 S.W.2d at 144.

112. *Id.* at 145.

113. *Id.* at 147.

114. *Id.*

115. *See id.* at 149.

property in any event.¹¹⁶ The court’s decision established the last major facet of how one may raise a tortious interference with inheritance or gift claim.¹¹⁷

Four years after *Brandes*, Texas’s tort law faced another question regarding tortious interference.¹¹⁸ Rather than establishing another restriction placed on a person raising the claim, tortious interference with *gift* was recognized.¹¹⁹

2. “Modern” Cases Addressing the Tort

From Texas’s first recognition of tortious interference with inheritance until the decision in *Brandes*, the tortious interference with inheritance was recognized, but no court found a person liable of the tort.¹²⁰ However, within the past decade there has been one notable decision that ruled that tortious interference with *gift* was a cause of action, and the court held that there were damages to the plaintiff under the tort.¹²¹ This case is *In re Marshall*, and even though this was a California court, the California Bankruptcy Court looked to Texas law to reach its decision.¹²² Therefore, *In re Marshall* marks the beginning of the “modern” case law addressing the tort in Texas.¹²³

a. *In re Marshall*—2002

The highly publicized case of *In re Marshall* involved Anna Nicole Smith and her late husband’s son, E. Pierce Marshall.¹²⁴ Smith alleged that her stepson tortiously interfered with her expectancy to receive a gift from her husband’s estate, which, before his death, her late husband promised she would receive.¹²⁵ Here, the California Bankruptcy Court carefully interpreted Texas’s law on tortious interference with *inheritance* and found that Texas law also recognizes a tort action for interference with *gift*.¹²⁶ Even though there is no specific case law in Texas establishing that tortious interference with gift, there is also no evidence that the Texas courts’ holdings are “limited solely to actions

116. *Disappointed Heir’s Revenge, Southern Style, supra* note 15, at 101. See *Brandes*, 966 S.W.2d at 149 (explaining that there is no tortious interference with inheritance or gift claim when “at least one the essential elements of appellants claim of interference with inheritance rights by proving appellants had not right of expectancy . . .”). *Id.*

117. See generally *Disappointed Heir’s Revenge, Southern Style, supra* note 15, at 101 (addressing the history of tortious interference with expectation of gift or inheritance as a tort in Texas from 1987 to *Brandes*).

118. See *Marshall*, 275 B.R. at 51.

119. See generally *id.*

120. See *King*, 725 S.W.2d at 755–56; *Neill*, 746 S.W.2d at 35–36; *Thompson*, 902 S.W.2d at 16; *Brandes*, 966 S.W.2d at 149.

121. *Marshall*, 275 B.R. at 58.

122. See *Disappointed Heir’s Revenge, Southern Style, supra* note 15, at 142–43.

123. See *Disappointed Heir’s Revenge, Southern Style, supra* note 15, at 142–43 (explaining that Texas appellate decisions “forecast” whether the Texas Supreme Court would recognize the tort).

124. See generally *Marshall*, 275 B.R. at 8.

125. See *Marshall*, 275 B.R. at 9.

126. See *id.* at 50–51.

for interference with inheritance rights.”¹²⁷ In addition to Texas case law, the California court also looked to other states’ guidance when necessary.¹²⁸ In its findings, the court determined that Anna Nicole Smith’s stepson had tortiously interfered with her expectancy of gift and that she was entitled to damages.¹²⁹

With the opinion of the California Bankruptcy Court and judgment in favor of Anna Nicole Smith, tortious interference with inheritance or gift is an established legal cause of action in Texas.¹³⁰ Texas courts continue to recognize the tort, but the finding of a sufficient tort claim is inconsistent because the courts find ways to rule against the person bringing the cause of action.¹³¹

b. *Urbanczyk v. Urbanczyk*—2009

Even though the California Bankruptcy Court determined the existence of a tortious interference with inheritance rights claim by using Texas law to reach its decision, courts across Texas remain skeptical about whether the tort is accepted as law.¹³² For instance, in *Urbanczyk v. Urbanczyk*, the court used the phrase “[a]ssuming, arguendo, Texas recognizes the [tortious interference with inheritance]”¹³³ This quote demonstrates that courts remain skeptical about the law regarding tortious interference with inheritance or gift.

Despite its skeptical view of the tort, the court analyzed whether tortious interference existed in this case.¹³⁴ Here, the son of the testator, Delmer Urbanczyk, sued his brother and sister-in-law for tortious interference with inheritance rights and argued, “the will was the result of the undue influence, duress, or fraud of his brother Marvin Urbanczyk and Marvin’s wife Janet Urbanczyk.”¹³⁵ At the trial court level, the court granted a summary judgment motion, which “challenged the damage element of Delmer’s theory of tortious interference with inheritance rights,” in favor of Marvin and Janet.¹³⁶ The

127. Jack W. Lawter, Jr. & Dianne Whitehorn Lawter, *Tortious Interference with Inheritance Rights*, <http://lawterandlawter.com/wp-content/uploads/2010/03/Tortious-Interference-with-Inheritance-Rights.pdf> (last visited Jan. 23, 2012). In this article, the Lawters explain that the court in *King* recognized that “equity will not suffer a right to be without a remedy.” *Id.* (citing *Chandler v. Wellborn*, 156 Tex. 312, 294 S.W. 2d 801, 807 (1956)).

128. *See Marshall*, 275 B.R. at 50–51.

129. *See id.* at 58.

130. *Id.* at 51.

131. *See, e.g., Haisler*, 2010 WL 2953372, at *3 (explaining that regardless of whether tortious interference with inheritance or gift is a legal cause of action, the statute of limitations bars the claim); *see also Urbanczyk*, 278 S.W.3d at 835 (noting that even if tortious interference with inheritance or gift were a cause of action, the person seeking damages under the claim would be barred from raising his claim because he did not provide any evidence of the alleged tortious conduct).

132. *See Haisler*, 2010 WL 2953372, at *3 (explaining that only a few Texas courts have recognized the tort as a cause of action).

133. *Urbanczyk*, 278 S.W.3d at 835.

134. *See id.* at 834–35.

135. *Id.* at 831.

136. *Id.* at 832, 835.

appeals court affirmed this judgment and explained that Delmer did not offer evidence of damages, which must arise from the alleged tortious conduct of the other party in order to have a tortious interference with inheritance or gift claim.¹³⁷

c. In re Estate of Russell—2010

Unlike the decision in *Urbanczyk*, the court's opinion in *In re Estate of Russell* is one that bolsters the California court's interpretation of Texas law regarding whether tortious interference with inheritance or gift is a legal cause of action.¹³⁸ In this case, three of the testatrix's grandchildren filed a tortious interference with inheritance or gift claim against the testatrix's son, Kenneth, and Brian Powers, the attorney who drafted two wills subsequent to an initial will that was executed by a different attorney.¹³⁹

After hearing the evidence, the appellate court determined that the testimony of Kenneth and Mr. Powers were contradictory and "that the evidence was sufficient to enable a reasonable and fair-minded jury to conclude that (1) there was an intended inheritance, and (2) Kenneth tortiously interfered with it."¹⁴⁰ This finding by the Court of Appeals of Texas, El Paso, affirmatively establishes the recognition and implementation of a valid claim for tortious interference with inheritance or gift in Texas.

d. Haisler v. Coburn—2010

With recent acknowledgement by a Texas court that a claim for tortious interference with inheritance or gift does, in fact, exist in Texas, courts continue to face issues regarding the extent to which one may pursue a tortious interference with inheritance or gift claim.¹⁴¹ Notably, the most recent of the cases, which ruled against people who raised a tortious interference with inheritance or gift cause of action, is from the Court of Appeals in Waco.¹⁴² This case added another facet when determining whether one may raise tortious interference with inheritance or gift as a cause of action in Texas.¹⁴³ In this case, the testator, Powell Coburn died in 2005, and his second wife, Juanita Coburn, "proffered a will dated October 10, 2002, for probate."¹⁴⁴ The 2002

137. *See id.* at 835.

138. *See Russell*, 311 S.W.3d at 531.

139. *Id.* at 530–31.

140. *Id.* at 535.

141. *See Russell*, 311 S.W.3d at 535 (holding that a reasonable jury could find that a person tortiously interfered with inheritance); *Haisler*, 2010 WL 2953372, at *1 (establishing a statute of limitations on raising a claim of tortious interference with inheritance or gift, which further restricts a person's ability on raising the claim).

142. *Haisler*, 2010 WL 2953372, at *1.

143. *See id.* at *3–4.

144. *Id.* at *1.

will left everything to Juanita; therefore, Haisler, Coburn's son, contested the will.¹⁴⁵ However, Haisler dismissed the contest after receiving some property under a family settlement agreement.¹⁴⁶ Later, Juanita's son-in-law informed Haisler that the probated 2002 will was forged and that several of Juanita's family members knew that the will had been forged.¹⁴⁷

Despite the evidence of the forged will, the court determined that the discovery rule of Texas Probate Code Section 93 does not apply to tortious interference claims.¹⁴⁸ The court went on to explain that "[t]he tortious interference claim was not a suit to cancel the will; it was a suit for damages."¹⁴⁹ Therefore, according to the court, the Texas Probate Code's discovery rule limitation does not apply to tortious interference claims.¹⁵⁰ Likewise, the court ruled that the discovery rule found in the Texas Civil Practice and Remedies Code did not apply to a tortious interference claim.¹⁵¹ The court further explained that "even in the face of allegations of fraud," historically, Texas probate courts fail to apply the discovery rule.¹⁵² While courts do have the authority to shape the law and have strongly influenced tortious interference with inheritance or gift claims, perhaps the court has gone too far. Because the court ruled that discovery rules do not apply to tortious interference with inheritance or gift claims, issues may arise when a person was actually tortiously harmed but did not know until the statute of limitations had run.

For example, a plaintiff may not have the ability to contest the will in probate court because he was never a beneficiary in a previous will nor a beneficiary of intestate succession; without sufficient evidence, a person may not be classified as an "interested part[y]."¹⁵³ Additionally, the same plaintiff may not be permitted to file a tortious interference with inheritance or gift claim because the statute of limitations has run, and the discovery rule does not apply to tortious interference with inheritance or gift claims.¹⁵⁴ Results such as these do not seem fair; there is not an adequate remedy for a plaintiff, nor a consequence for a person that interfered with the plaintiff's future inheritance.

Later, this comment will analyze whether the Court of Appeals made the best decision when holding that the discovery rule should not apply to tortious

145. *Id.*

146. *Id.*

147. *Id.*

148. *Haisler*, 2010 WL 2953372, at *4; TEX. PROB. CODE ANN. § 93 (West 2001). The code provides, "... any interested person may institute suit in the proper court to *cancel* a will for forgery or other fraud within two year after the discovery of such forgery or fraud, and not afterward." (emphasis added).

149. *Haisler*, 2010 WL 2953372, at *3.

150. *See id.* at *3.

151. *See Haisler*, 2010 WL 2953372, at *4; TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (West Supp. 2009).

152. *Haisler*, 2010 WL 2953372, at *4 (citing *Little v. Smith*, 943 S.W.2d 414, 420 (Tex. 1997); *Frost Nat'l Bank v. Fernandez*, 2010 Tex. Lexis 321 (Tex. 2010)).

153. *See Disappointed Heir's Revenge, Southern Style*, *supra* note 15, at 82.

154. *Haisler*, 2010 WL 2953372, at *3.

interference with inheritance or gift claims.¹⁵⁵ Additionally, this comment will argue what should be considered the proper statute of limitations for this tort claim.¹⁵⁶

C. A Summary of the Tort Established by Texas Case Law

Since Texas courts first recognized tortious interference with inheritance, courts seem to have developed the tort by establishing limitations to keep a person from realizing damages under the tort. To put the rules established by courts simply, a cause of action for tortious interference with inheritance exists in Texas, and the recognition of the tort expanded to gift in 2002.¹⁵⁷ However, a court would likely not recognize a tortious interference claim if a person has not utilized his probate remedies.¹⁵⁸ Additionally, a person does not have a right to the claim if he lacked (1) the ability to keep someone from making changes to a will or (2) the expectancy to inherit a particular gift.¹⁵⁹ Lastly, the discovery rule does not apply to tortious interference with inheritance or gift claims.¹⁶⁰

Even though the courts have the authority to establish the scope of the tortious interference with inheritance or gift claim, the courts may have created too many restrictions, forcing victims to forgo adequate remedies when a person has tortiously interfered with inheritance or gifts the victim may be entitled to. Additionally, there is no clear rule regarding what damages may result from utilizing a tortious interference with inheritance or gift claim as a remedy.¹⁶¹ Perhaps the legislature should step in and establish concrete rules for the tort. However, before determining what steps the legislature should take, understanding the damages that could result when bringing a cause of action under the tort may be helpful.

V. DAMAGES UNDER THE TORT

There is little authority regarding damages that could result from a tortious interference with inheritance or gift claim. The comments of the Restatement of Torts regarding tortious interference with inheritance or gift, refers to damages that could result from interference with contract.¹⁶² According to the Restatement of Torts, damages arising from interference with contractual relations or prospective contractual relations include: “(a) the pecuniary loss of the benefits of the contract or the prospective relation; (b) consequential losses

155. See discussion *infra* Parts V, VI.

156. *Id.*

157. See discussion *supra* Parts IV.A, B.2.a.

158. See discussion *supra* Part IV.B.1.a.

159. See discussion *supra* Part IV.B.1.b, c.

160. See discussion *supra* Part IV.B.2.d.

161. See *infra* Part V.

162. RESTATEMENT (SECOND) OF TORTS § 774B (1979).

for which the interference is a legal cause; and (c) emotional distress or actual harm to reputation, if they are reasonably to be expected to result from the interference.”¹⁶³ Adapting these damages to tortious interference with inheritance or gift seems appropriate because tortious interference with inheritance or gift stems from tortious interference with contract claims.¹⁶⁴ Therefore, even though intentional interference has been made with a potential inheritance or gift, “[d]amages typically consist of the value of the property plaintiffs would have received in the absence of the tortious conduct.”¹⁶⁵

In addition to the damages suggested in the restatement, considerations should be made for other forms of damages, such as punitive damages, restitution, and the creation of a constructive trust.¹⁶⁶ Generally, a plaintiff may bring an action for punitive damages “under appropriate circumstances.”¹⁶⁷ The plaintiff could also receive punitive damages if a jurisdiction allows a plaintiff to file a tortious interference claim subsequent to a successful will contest.¹⁶⁸ Additionally, the comments explain that a person who unlawfully “acquired the benefits of the legacy or gift” may be required to pay restitution as a damage to the crime committed.¹⁶⁹ Lastly, in order to prevent unjust enrichment, the court may create a constructive trust to benefit the alternative beneficiaries.¹⁷⁰ This constructive trust is considered an equitable remedy.¹⁷¹

Analyzing the damages that could result from a tortious interference with inheritance or gift claim creates even more uncertainty about the limitations of the tort claim and the consequences that may result when the tort is utilized. With a growing number of concerns raised regarding the tort, the Texas legislature should create a uniform understanding of the tort to enable courts and lawyers to make better use of the tort.

VI. CONCLUSION

Tortious interference with inheritance or gift is a valid claim in Texas and has been established as a valid claim by the Texas courts.¹⁷² While questions have been raised over whether tortious interference of gift is a valid tort action, tortious interference with gift should not be distinguished from tortious interference of inheritance. Even though this cause of action is a valid claim

163. RESTATEMENT (SECOND) OF TORTS § 774A (1979).

164. Siegel, *supra* note 23, at 256–57. See Marmai, *supra* note 23, at 296.

165. Fassold, *supra* note 27.

166. See RESTATEMENT (SECOND) OF TORTS § 774A cmt. a (1979); RESTATEMENT (SECOND) OF TORTS § 774B cmt. e. Remedies (1979); Fassold, *supra* note 27.

167. RESTATEMENT (SECOND) OF TORTS § 774A cmt. a (1979).

168. See Fassold, *supra* note 27.

169. RESTATEMENT (SECOND) OF TORTS § 774B (1997).

170. See RESTATEMENT (SECOND) OF TORTS § 774B (1997).

171. Epstein, *supra* note 50, at 3.

172. See discussion *supra* Part IV.

under Texas law, the Texas legislature should evaluate and establish the limitation of the tort.

As the tort stands right now, courts may make as many changes and additional nuances to the claim as they choose.¹⁷³ This unlimited number of changes creates difficulty for a lawyer to predict when a court may rule favorably on the tortious interference claim and when a court would rule against a person raising a tortious interference claim. Because of this uncertainty, lawyers certainly have difficulty in advising their clients on whether the tort is a good claim to file a suit under. If an attorney is able to better advise their client on the likelihood of a successful tortious interference with inheritance or gift claim, and time and money could be saved.

To ensure that courts and attorneys follow the same standards across the state, the Texas legislature must clearly define the tort as well as expressly state the tort's limitations. In defining the tort, the legislature should adopt the generally accepted elements of the tort: (1) the existence of an expectancy; (2) intentional interference with that expectancy; (3) interference that constitutes tortious conduct; (4) reasonable certainty that the plaintiff would have received the expectancy but for the interference; and (5) resulting damages.¹⁷⁴

Additionally, the legislature must determine the statute of limitations of the claim. The limitations period could be that used for torts generally in Texas, two years.¹⁷⁵ More importantly, however, the legislature must overrule the court's opinion in *Haisler*¹⁷⁶ and establish that the discovery rule does apply to tortious interference with inheritance or claims. Without doing so, the legislature would not follow what could be considered one of the essential reasons for allowing the tort: "equity will not suffer a right to be without a remedy."¹⁷⁷ In other words, "every wrong should have a remedy."¹⁷⁸

The legislature should also establish that this tort may be raised independently from a will contest in probate court. This is a separate cause of action and should be treated accordingly. With this in mind, the legislature should establish that not only compensatory damages result but also punitive damages and damages for emotional distress. This is appropriate because a tort claim has a different goal than a will contest.¹⁷⁹ Therefore, the damages awarded after a tort claim should adequately reflect the differing goal: the goal to remedy the plaintiff after an intentional tort has been committed on him.¹⁸⁰

Even if the Texas legislature does not adopt rules to govern the tort, Texas courts must be careful not to restrict access to the cause of action. It has been

173. See discussion *supra* Part IV.

174. See Fassold, *supra* note 27.

175. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (West 2005).

176. See discussion *supra* Part IV.B.d.

177. See Lawter, *supra* note 127.

178. See Mignogna, *supra* note 22.

179. See discussion *supra* Part II.

180. See discussion *supra* Part II.

said: “a large part of what is most valuable in modern life depends upon ‘probable expectancies.’”¹⁸¹ With this in mind, Texas must continue to uphold the allowance of the tort, without over restrictions. Plaintiffs who have been wronged must have a platform to stand on to undo the intentional harm that they have suffered.

181. Renfroe, *supra* note 56, at 412 (quoting PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 1005–06) (W. Page Keeton et. al. eds., 5th ed. 1984) (footnote omitted).