

# WILL CONTESTS AND RELATED LITIGATION: AN OVERVIEW

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# OVERVIEW

- Causes of Action
- Practical Considerations
- Estate Planning Considerations

# CAUSES OF ACTION

- Will Challenge for lack of testator's capacity
- Will Challenge for execution by a testator under undue influence
- Tortious Interference with an Expectancy
- Miscellaneous claims against the testator/estate

# LACK OF CAPACITY

In order to sufficiently allege lack of testamentary capacity, a plaintiff need only plead that “the testator had become, and was at the time of the making of the will, of unsound mind and memory.”

- *American Bible Society v. Price*, 115 Ill. 623, 635-6 (1886)
- *In re Estate of Sutera*, 199 Ill. App. 3d 531, 539 (1st Dist. 1990) *quoting American Bible*
- *Bailey v. State Bank of Arthur*, 121 Ill. App. 3d 17, 22 (4th Dist. 1983) *quoting American Bible*.

# LACK OF CAPACITY

“A pleader is not required to set out his evidence, but need only plead the ultimate facts to be proved.” *Borgsmiller v. Burroughs*, 187 Ill. App. 3d 1, 7 (5th Dist. 1989).

“The specific name applied to describe [the testator’s incapacity], the means whereby the [incapacity] was caused, or how it came about that the [incapacity] caused this writing to be drawn and signed, were matters of evidence that need not be alleged, and, if alleged, need not be proved.” *Sutera*, 199 Ill. App. 3d at 539 quoting *American Bible*.

# LACK OF CAPACITY

## So what needs to be alleged?

- Testator unable to know the nature and extent of his property;
- Testator unable to know the natural objects of his bounty; or
- Testator unable to dispose of his property according to some plan formed in his mind.
- For an example: *Sutera*, 199 Ill. App. 3d at 535 and 539 (“in terms of... what degree of incapacity must be alleged, the allegations appear sufficient.”)

# LACK OF CAPACITY

## So what needs to be alleged?

- Lack of capacity must exist at the time that the decedent executed the will.

## BUT

- “It is well established that proof of the mental condition of the [testatrix] a reasonable time either before or after the execution of the will is competent... to show mental condition at the time of making the will.” *In re Estate of Dossett*, 159 Ill. App. 3d 466, 473 (3d Dist.1987) quoting *Trojczak v. Hafliger*, 7 Ill. App. 3d 495 (1972) citing *Mitchell v. Van Scoyk*, 1 Ill. 2d 160 (1953).

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# UNDUE INFLUENCE

“What constitutes undue influence cannot be defined by fixed words and will depend upon the circumstances of each case.” *DeHart v. DeHart*, 2013 IL 114137, p. 27.

That being said...

# UNDUE INFLUENCE

“Undue influence... is any improper... urgency or persuasion whereby the will of a person is over-powered and he is indeed induced to do or forebear an act which he would not do or would do if left to act freely... the influence must be of such a nature as to destroy the testator’s freedom concerning the disposition of his estate and render his will that of another.” *DeHart v. DeHart*, 2013 IL 114137, p. 27.

# UNDUE INFLUENCE

## Two Ways to Prove

1. Proof by a preponderance of the evidence
2. Presumption of undue influence

# PROVING UNDUE INFLUENCE USING A PRESUMPTION

- Plaintiff can establish a presumption of undue influence, which shifts the burden to the defendant to rebut the presumption. *DeHart v. DeHart*, 2013 IL 114137, p. 29.
- “a presumption of undue influence is something that can be determined – at the earliest – after the close of plaintiff's case.” *Id.*

# PROVING UNDUE INFLUENCE USING A PRESUMPTION

1. A fiduciary relationship exists between the testator and a person who receives a substantial benefit from the will;
2. the testator is the dependent and the beneficiary the dominant party;
3. the testator reposes trust and confidence in the beneficiary; and
4. the will is prepared by or its preparation procured by such beneficiary. *Dehart*, 2013 IL 114137, p. 30.

# UNDUE INFLUENCE

- “The person charged with exercising undue influence must receive a substantial benefit as a legatee or beneficiary.” *In re Estate of Lemke*, 203 Ill. App. 3d 999, 1006 (5th Dist. 1990).
- Is being named executor a substantial benefit?

Not per *Lemke*

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# TORTIOUS INTERFERENCE

Tortious interference with an expectancy requires:

- the existence of an expectancy;
- intentional interference with the expectancy by defendant;
- interference involved tortious conduct, i.e. fraud, duress, undue influence;
- but for the interference, plaintiff was reasonably certain to receive the expectancy; and
- damages. *Nemeth v. Banhalmi*, 99 Ill. App. 3d 493, 499 (1st Dist. 1981).



# TORTIOUS INTERFERENCE

- A, B, and C are all siblings and equal beneficiaries under their mother's will.
- A does not like C and fraudulently convinces their mother to cut C out of the will to A and B's benefit.
- B knows that A fraudulently interfered with C's expectancy, but does not actively participate in the fraud.
- Can C sue B for tortious interference?

# TORTIOUS INTERFERENCE

## Probably Not

- “In order to state a cause of action for fraud arising from concealment of an existing material fact, the complaint must plead that the concealment was done with an intent to deceive under circumstances creating a duty to speak.” *Greene v. First Nat’l Bank*, 162 Ill. App. 3d 914, 922 (1st Dist. 1987).
- “In order to maintain such a claim, a plaintiff must establish the existence of a special or fiduciary duty relationship, which would raise a duty to speak.” *Workforce Solutions v. Urban Servs. of Am.*, 2012 IL App (1st) 111410, p. 94 (internal quotations omitted).

# TORTIOUS INTERFERENCE

Tortious interference with an expectancy requires:

- the existence of an expectancy;
- intentional interference with the expectancy by defendant;
- interference involved tortious conduct, i.e. fraud, duress, undue influence;
- but for the interference, plaintiff was reasonably certain to receive the expectancy; and
- damages. *Nemeth v. Banhalmi*, 99 Ill. App. 3d 493, 499 (1st Dist. 1981).

# TORTIOUS INTERFERENCE

## What is a reasonably certain expectancy?

- It is a high standard. *Simon v. Wilson*, 291 Ill. App. 3d 495, 507 (1st Dist. 1997).
- A bare possibility may not be [protectible] [sic]. But where an intending donor, or testator, or member of a benefit society, has actually taken steps toward perfecting the gift, or devise, or benefit, so that **if let alone the right of the donee, devisee, or beneficiary, will cease to be inchoate and become perfect**, we are of the opinion that there is such a status that an action will lie, if it is maliciously and fraudulently destroyed, and the benefit diverted to the person so acting, thus occasioning loss to the person who would have received it. *Nemeth*, 99 Ill. App. 3d at 498 *citing Mitchell v. Langley*, 143 Ga. 827 (1915) (emphasis added).

# TORTIOUS INTERFERENCE

## What is a reasonably certain expectancy?

- A trustee of a decedent's estate erroneously telling a plaintiff that she has a power of appointment under the decedent's will does not create a reasonably certain expectancy. *Greene v. First Nat'l Bank*, 162 Ill. App. 3d 914 (1st Dist. 1987).
- A fiduciary's failure to take steps charged to the fiduciary by a decedent that would perfect a plaintiff's expectancy does not create a reasonably certain expectancy. *Simon v. Wilson*, 291 Ill. App. 3d 495 (1st Dist. 1997).

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# MISCELLANEOUS CLAIMS

- Claims against decedent
  - proceeds as a claim against the testator with executor acting for the testator.
  - Includes *quantum meruit* for reasonable cost of care
- Contracts to make a will
  - Statute of Frauds applies.
  - Must show terms by clear and convincing evidence.

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# WHO IS A PROPER PLAINTIFF

## Will Challenges

- An “interested party.” 755 ILCS 5/8-1.
  - defined at 755 ILCS 5/2.11
- Includes:
  - Heirs
  - Beneficiaries from prior wills
    - Does not need to be from a will immediately preceding the probated will
    - But if not from a will immediately preceding the probated will, must challenge wills one at a time.

# WHO IS A PROPER PLAINTIFF

## Tortious Interference

- Any individual with a legitimate expectancy.
  - Remember that they must have a “reasonably certain” expectancy.

## Miscellaneous Claims

- Anyone.

# WHO IS THE PROPER DEFENDANT

The estate is the defendant for will challenges and miscellaneous claims against the estate. It acts through the executor and any award is paid out of the estate's assets.

For tortious interference claims, the individual who tortuously interfered is the defendant and any award is paid out of his or her personal assets.

# STATUTE OF LIMITATIONS

Will challenges must be brought within six months of after admission to probate. 755 ILCS 5/8-1.

Tortious interference claims may be brought within five years after the death of the testator. *In re Estate of Ellis*, 236 Ill. 2d 45 (Ill. 2009).

For miscellaneous claims against the estate/testator, apply the limitation period for the claim brought against the testator. *See in re Estate of Krevchena*, 244 Ill. App. 3d 160 (1st Dist. 1993).

# DEAD MAN'S ACT

- Generally, “[i]n the trial of any action in which any party sues or defends as the representative of a deceased person or person under a legal disability, no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased or person under legal disability or to any event which took place in the presence of the deceased or person under legal disability...” 735 ILCS 5/8-201
- Does not apply to tortious interference claims, because deceased person is not “suing or defending”.

# DISCOVERY CONSIDERATIONS

- Medical Records
- Frequency of interactions/vacations
- Telephone Records
- Photographs
- Powers of Attorney and other agency relationships
- Payable on Death and Insurance Policies
- Social Media

# ATTORNEY'S FEES

The trial court has discretion to order the estate to pay the executor's attorney's fees expended defending a will challenge, even when unsuccessful. *In re Estate of Elias*, 408 Ill. App. 3d 301 (1st Dist. 2011).

The trial court can order a wrongdoer to pay an executor's attorney's fees, instead of the estate. *Id.*

Attorney's fees are not recoverable for successful plaintiffs or for defending tortious interference of an expectancy claims.

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# PRIVILEGE

- “Where an attorney prepares a will for a client and witnesses the same, the privilege only exists during the lifetime of the client.” *DeHart v. DeHart*, 2013 IL 114137, p. 69.
- “The rationale behind this limited exception to the privilege is that a decedent would (if one could ask him) forgo the privilege so that the distribution scheme he actually intended can be given effect.” *Id.*
- This rule also applies to the accounting privilege. *Brunton v. Kruger*, 2014 IL App (4th) 130421.

## *IN TERROREM* CLAUSES

Treat all challengers as predeceasing  
testator

OR

Treat all challengers and their heirs as  
predeceasing testator

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