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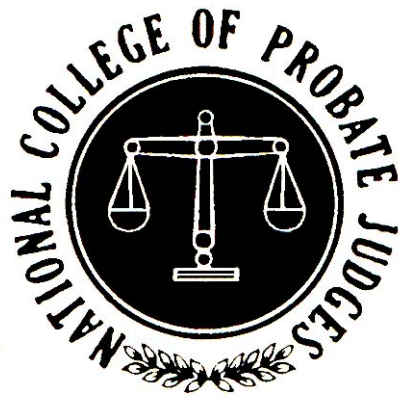

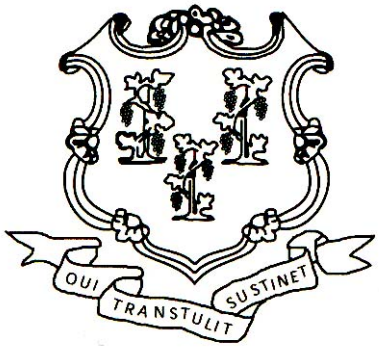

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QUINNIPIAC PROBATE LAW JOURNAL

VOLUME 32 2019 ISSUE 2

TABLE OF CONTENTS

OPINIONS OF THE CONNECTICUT PROBATE COURT

NOTE

APPENDIX

QUINNIPIAC PROBATE
LAW JOURNAL

VOLUME 32 2019 ISSUE 2

OPINION OF THE CONNECTICUT PROBATE COURT

IN THE MATTER OF JANET M. BROWNELL

PROBATE COURT, TOBACCO VALLEY DISTRICT

MARCH 27, 2018

EDITOR'S SUMMARY & HEADNOTES

Decedent died intestate, holding sole title to real property in Bloomfield, Connecticut. Petitioner executed a timely irrevocable disclaimer of his entire distributive share of Decedent's Estate. The State, acting through the Department of Administrative Services, claimed a lien against Petitioner's share of the Estate for reimbursement for incarceration and public assistance costs. The Court found that while Petitioner's Disclaimer was validly executed, the State did provide adequate notice of the lien against the Estate. As a result, Petitioner's Disclaimer was invalid, and the State can be reimbursed for Petitioner's incarceration and public assistance costs through Petitioner's inheritance from the Decedent's Estate.

1. **Disclaimers: Delivery**

   Pursuant to Conn. Gen. Stat. § 45a-579(d)(1)(A), a disclaimer must be delivered to the fiduciary not later than the date which is nine months after the later of several stated events including the decedent's date of death.

2. **Disclaimers: Generally**

   Pursuant to Conn. Gen. Stat. Ch. 802(g), a disclaimer must be validly executed, timely delivered, express clear intent and description, and properly recorded.

3. Disclaimers: Disclaiming Heir

Pursuant to Conn. Gen. Stat. § 45a-579(a), an heir can disclaim whole or part of any interest passing by intestacy by delivering a written disclaimer.

4. Disclaimers: Procedure

Pursuant to Conn. Gen. Stat. § 45a-579(c), the disclaimer shall (1) describe the interest disclaimed, (2) be executed by the disclaimant in a manner provided for the execution of deeds of real property, and (3) declare the disclaimer and the extent thereof.

5. Disclaimers: Requirements

Pursuant to Conn. Gen. Stat. § 45a-579(d)(4), a disclaimer must be recorded on the land records where the real property is located within the nine-month period. If the disclaimer and receipt of delivery by the holder of the real property title is filed with the probate court within the nine-month period, such action is conclusive evidence of a timely disclaimer.

6. Claims Against Estate: Liens

Pursuant to Conn. Gen. Stat. § 17b-94(b), the probate court shall accept an assignment of inheritance by the beneficiary to the state or a lien notice by the state if such assignment or lien notice is filed by the Commission of Administrative Services with the court, prior to the distribution of such inheritance. To the extent of such inheritance not already distributed, the court shall order distribution in accordance with such assignment or lien notice.

7. Claims Against Estate: Liens

Pursuant to Conn. Gen. Stat. § 18-85b(b), the probate court shall accept a lien notice against an estate inheritance filed by the Commissioner of Correction.

8. Disclaimers: Relate Back

Pursuant to Conn. Gen. Stat. § 45a-579(e)(5), a disclaimer shall relate back, for all purposes, to the date of death of the deceased owner or of the donee of the power of appointment.

9. Medicaid: Generally

Pursuant to Conn. Gen. Stat. § 17b-2, Medicaid assistance is administered by the State.

10. Medicaid: Resource Limitations

Pursuant to Conn. Gen. Stat. § 17b-85, a recipient of Title XIX Medicaid assistance shall not sell, assign, transfer, encumber, or otherwise dispose of any property without the consent of the commissioner.

11. Statutory Interpretation: Generally

There is a presumption that the Legislature, in enacting a law, does so with regard to existing relevant statutes so as to make one consistent body of law. If two statutes appear to be repugnant, they are to be construed, if reasonably possible, so that both are operative.

12. Claims Against Estate: Liens

Conn. Gen. Stat. § 45a-579(e)(5) is inoperative as to state liens claiming reimbursement pursuant to sections 17b-94(b) and 18-85b(b). Conn. Gen. Stat. §§ 17b-94(b) and 17b-85 were not intended by the Legislature to be an exclusive list of programs subject to a priority state lien for the reimbursement of expenses.

13. Disclaimers: Irrevocability

Pursuant to Conn. Gen. Stat. § 45a-578(c), a disclaimer which complies with the requirements of said sections detailing execution, description, timeliness, delivery, and receipt, is irrevocable.

14. Disclaimers: Validity

When a statute precludes a disclaimer from being effective, the disclaimer is deemed "invalid."

Opinion

Background

Janet M. Brownell ("Decedent") died intestate on August 2, 2017. She was domiciled in Bloomfield, Connecticut, where she held sole fee title to real property known as 122 Wintonbury Avenue, Bloomfield. Decedent's heirs at law, her two children, Patricia A. Pichette ("Administratrix"), who was appointed Administratrix of the Estate on October 16, 2017, and William J. Leonard, Jr. ("Leonard").

[1] Leonard executed an irrevocable disclaimer ("Disclaimer") of his entire distributive share of Decedent's Estate ("Estate") on January 31, 2018. He filed same with the Probate Court on February 2, 2018, and recorded a duplicate original on the Bloomfield Land Records on February 5, 2018. All the foregoing dates are within nine months of the date of death, August 2, 2017, as required by Connecticut General Statutes section 45a-579(d)(1)(A).

At the Court hearing on February 22, 2018, all witnesses were sworn in under oath, and the Disclaimer was admitted as Exhibit B. The Court also admitted Exhibits A and C: state incarceration expenses and public assistance records for Leonard, respectively. The State claimed liens for reimbursement in the amounts of $118,281.00 (incarceration) and $11,528.29 (public assistance). The State, acting through the Department of Administrative Services ("DAS"), forwarded a letter to the Court, dated October 26, 2017, claiming a lien against Leonard's distributive share of the Estate. DAS also sent two letters with an attached Proof of Claim, one to Administratrix and the other to the Court. Both letters were dated February 8, 2018, and claimed liens against the distributive share of Estate assets to Leonard for both indebtedness, herein referenced. Neither letter specified the calculation details of the State's claim. The letters did include the amounts due, the general statutory authority for making state claims for reimbursement, and the party against whom the lien was being asserted. Robin Dawkins-Khan, an employee of DAS, testified that the State's protocol is to send out general notice of its claimed lien, stating the amounts, general statutory authority, and the party against whom the lien is asserted. She testified that due to confidentiality, more specific information must be requested by the subject party, the fiduciary, or the court.

In his testimony, Leonard neither denied his incarceration for the periods identified by the State, nor offered testimony refuting the alleged public assistance afforded to his former wife for the welfare of his then minor children. On behalf of DAS, Ms. Dawkins-Khan testified that the reimbursement for public assistance was not associated with any child support arrangements. Instead, it was for public assistance unrelated to any prior court orders against Leonard for child or spousal support.

Issues and Findings

A. Issue One: Was the Disclaimer properly executed, timely delivered and recorded, and sufficiently clear as to the interest being disclaimed?

[2][3][4][5] The Court finds that Leonard's Disclaimer was validly executed, timely delivered, expressed clear intent and description, and was recorded on the Bloomfield Land Records in accordance with Connecticut General Statues Chapter 802(g). Connecticut General Statutes section 45a-579(a) allows an heir to disclaim in whole or in part any interest passing by intestacy by delivering a written disclaimer. Conn. Gen. Stat. § 45-579(a) (2018). Connecticut General Statutes section 45a-579(c) requires that "[t]he disclaimer shall (1) describe the interest disclaimed, (2) be executed by the disclaimant in a manner provided for the execution of deeds of real property . . . , and (3) declare the disclaimer and the extent thereof." Conn. Gen. Stat. § 45a-579(c). Connecticut General Statutes section 45a-579(d)(1), in part, requires that a disclaimer be delivered to the fiduciary not later than the date which is nine months after the later of several stated events, which in this instance, was Decedent's

date of death. *See* Conn. Gen. Stat. § 45a-579(d)(1)(A). The statute further requires that if an interest in real property is disclaimed, a copy of such disclaimer must be recorded on the land records where the real property is located within the nine-month period. *See* Conn. Gen. Stat. § 45a-579(d)(4). While not required, Connecticut General Statutes section 45a-579(d)(4) provides that if the disclaimer and receipt of delivery by the holder of the real property title is filed with the probate court within the nine-month period, such action "shall constitute conclusive evidence of timely disclaimer." *Id.*

Based upon the testimony of Leonard and Administratrix, court records, and the Disclaimer, the Court finds that the Disclaimer was properly executed, witnessed and acknowledged, and that it was delivered to the Administratrix and filed on the Bloomfield Land Records within the mandated nine-month period. The Disclaimer sufficiently stated the extent of the disclaimer, which was Leonard's entire distributive share as an heir of the Estate.

The Disclaimer, with receipt of delivery to Administratrix, was also filed with the Court on February 2, 2018, within nine months of Decedent's death, thereby constituting conclusive evidence of a "timely disclaimer." *See id.*

B. Issue Two: Did the State's notice of lien for claimed reimbursement of expenses against the distributive share of William J. Leonard, Jr. provide proper notice under Connecticut General Statutes sections 17b-94(b) and 18-85b(b)?

At the hearing and in his brief, the attorney for the Estate ("Counsel") questioned the adequacy of the form of notice used by DAS to inform the Court, the parties, and the Estate of any claimed lien for expense reimbursement. No statute or law was offered to prove the DAS notice was inadequate. Ms. Dawkins-Khan testified that the letters sent to the Court, subject parties, and Estate were adequate and complied with the statute. She also explained DAS protocols for providing more detailed information, records, and reimbursement calculations. Exhibits A and C provided at the hearing contained greater detail for both alleged state claims.

[6] Connecticut General Statutes section 17b-94(b) (state assistance programs) describes the requirement of a "lien notice" as follows:

> [t]he Court of Probate shall accept any such assignment executed by the beneficiary or parent or any such lien notice if such assignment or lien notice is filed by the Commissioner of Administrative Services with the court prior to the distribution of such inheritance, and to the extent of such inheritance not already distributed, the court shall order distribution in accordance with such assignment or lien

notice.

Conn. Gen. Stat. § 17b-94(b) (2018).

[7] Connecticut General Statutes section 18-85b(b) (incarceration expenses) has a similar provision, subject to a twenty-year time limitation, which requires that the probate court accept such "lien notice" filed by the commissioner or the commissioner's designee. *See* Conn. Gen. Stat. § 18-85b(b) (2018).

The Court finds that in both instances, the State satisfied its statutory obligation of providing notice of its alleged lien for reimbursement against the distributive share of Leonard from the Estate. Nothing prevented the Estate and subject party from requesting more detailed information and calculations from the State.

C. Issue Three: Does the Disclaimer relate back to Decedent's date of death, eliminating any inheritance and barring the State from claiming a lien against the distributive share of the disclaimant heir for reimbursement of expenses as they relate to Connecticut General Statutes sections 17b-94(b) (various state assistance programs) and 18-856(b) (costs of incarceration)?

[8] Connecticut General Statutes section 45a-579(e)(5) states "[a] disclaimer shall relate back for all purposes to the date of death of the deceased owner or of the donee of the power of appointment." Conn. Gen. Stat. § 45a-579(e)(5). Counsel claims that Leonard's Disclaimer relates back to Decedent's death on August 2, 2017. The effect is to treat Leonard as if he never acquired any interest in the real property contained in Decedent's Estate. Accordingly, the State could not have acquired a lien interest against Leonard's distributive share of the Estate. Counsel cites *Aceto v. Chaconis*, 40 Conn. L. Rptr. 675 (Conn. Super. Ct. 2006) in support of this legal premise.

Counsel further contends that pursuant to Connecticut General Statutes section 17b-85, beneficiaries of the enumerated public assistance programs are prohibited from selling, assigning, transferring, encumbering, or otherwise disposing of any property subject to the state reimbursement without the consent of the Commissioner of the Department of Social Services. *See* Conn. Gen. Stat. § 17b-85 (2018). However, since Connecticut General Statutes section 17b-85 expressly omits any mention of incarceration, Counsel argues that a former inmate may sell, assign, transfer, encumber, or otherwise dispose of any property without the consent of the Commissioner of Social Services. *See id*. Therefore, Counsel argues that even if the Disclaimer is ineffective to bar state reimbursements for general assistance programs set forth in Connecticut General Statutes sections 17b-85 and 17b-94(b), the Disclaimer remains valid and effective to prevent a lien to reimburse the State for incarceration costs.

Although the case of *Aceto* is instructive in describing the legal requirements of a disclaimer, it does not address the issue of state claims as a bar to a disclaimer. *See Aceto*, 40 Conn. L. Rptr. at 676. Instead *Aceto* involves claims between private parties. *Id.* at 675.

[9][10] Both issues, however, were addressed by our Supreme Court in *State v. Murtha*, 179 Conn. 463 (1980). In *Murtha*, the defendant received Title XIX assistance under the federal Social Security Act. *Murtha*, 179 Conn. at 463. In Connecticut, Medicaid assistance is administered by the State. *See* Conn. Gen. Stat. § 17b-2 (2018). Connecticut General Statutes section 17b-85 states that a recipient of Title XIX assistance shall not "sell, assign, transfer, encumber or otherwise dispose of any property without the consent of the commissioner." Conn. Gen. Stat. § 17b-85. In *Murtha*, the defendant maintained that then section 45-302 (currently embodied in section 45a-579(e)(5)), which allowed a disclaimer to relate back to decedent's date of death, should be given effect to bar the State's right to reimbursement. *Murtha*, 179 Conn. at 466. The defendant further argued that the Legislature made no exceptions to the "relate back" provision of section 45-302 for Title XIX assistance, and that the "relate back" general assistance exceptions specifically enumerated were inapplicable to recoupment of Medicaid assistance. *Id.*

[11] The Connecticut Supreme Court in *Murtha* arrived at a different conclusion. The court stated "[t]here is a presumption that the [L]egislature, in enacting a law, does so with regard to existing relevant statutes so as to make one consistent body of law." *Id.* The court further stated "[i]f two statutes appear to be repugnant, they are to be construed, if reasonably possible, so that both are operative." *Id.* at 467. Based upon these two well-established principles of statutory construction, the court held that Connecticut General Statutes section 45-302, allowing a disclaimer to relate back to decedent's date of death, "must be considered as operative only when there is no bar to the disclaimer." *Id.* at 497.

In a subsequent case, *Dep't of Income Maint. v. Watts*, 211 Conn. 323 (1989), the law set forth in *Murtha* was reaffirmed by our Supreme Court. The court stated,

> [w]e held in *Murtha*, as we do in the present case, that the language of the disclaimer statute 'must be considered as operative only when there is no bar to the disclaimer such as exists in § 17-82j.' Such a construction gives effect to both statutes because it first determines, pursuant to § 17-82j, whether a valid disclaimer exists, and second, pursuant to § 45-300(e), it specifies the consequences of such a disclaimer, if it is valid. 'The propriety of this construction of the two statutes is underscored by the enactment of § 45-303 which lists a number of actions by a beneficiary [that] would serve to bar a right to disclaim. There is no intimation in § 45-303 that the actions described [therein] form an exclusive list of

> circumstances barring a disclaimer.' Accordingly, we conclude that § 17-82j provides a bar to disclaimers that is separate and distinct from those found in § 45-303.

Watts, 211 Conn. at 329 (internal citations omitted).

[12] In accordance with the holdings in *Murtha* and *Watts*, this Court makes the following findings: (1) Connecticut General Statutes section 45a-579(e)(5) (incorporating language of former section 45-302) is inoperative as to state liens claiming reimbursement pursuant to both sections 17b-94(b) and 18-85b(b); and (2) Connecticut General Statutes sections 17b-94(b) and 17b-85 were not intended by the Legislature to be an exclusive list of programs subject to a priority state lien for the reimbursement of expenses. As such, Leonard's Disclaimer is invalid and ineffective, and does not bar the State from asserting a lien for reimbursement pursuant to Connecticut General Statutes sections 17b-94(b) and 18-85b(b).

D. Issue 4: Can a Disclaimant rescind an otherwise properly executed, delivered, and recorded disclaimer? If not, does the Disclaimant lose his or her right to an inheritance in excess of the State's statutory claims against the distributive share of the Disclaimant's inheritance?

[13] Connecticut General Statutes section 45a-578(c) states, "[a] disclaimer which complies with the requirements of said sections is irrevocable." Conn. Gen. Stat. § 45a-578(c) (2018). As noted above, Leonard's Disclaimer was found by this Court to comply with the statutory provisions of execution, description, timeliness, delivery, and receipt. Leonard stated in his Disclaimer that it was "irrevocable."

[14] The holdings in *Murtha* and *Watts* suggest that when a statute precludes a disclaimer from being effective, the disclaimer is deemed "invalid." In *Murtha,* the court stated, "[n]onetheless, in light of our previous conclusion that [the defendant's] disclaimer is invalid," the State was able to reassess eligibility for assistance under Title XIX and State guidelines. *Murtha*, 179 Conn. at 470. The court in *Watts* also held that the court must first determine "whether a valid disclaimer exists" before looking at the "consequences of such a disclaimer." *Watts*, 211 Conn. at 329.

Conclusion

It is ORDERED AND DECREED that:

Accordingly, the Court makes the finding that because of the statutory bar to Leonard's Disclaimer, as provided in Connecticut General Statutes sections 17b-94(b) and 18-85b(b), the Disclaimer executed by Leonard was invalid and, therefore, does not prevent Leonard from inheriting Estate assets in excess of the State's allowed reimbursement.

Reimbursements pursued by the State pursuant to Connecticut General Statutes sections 17b-94 and 18-85b(b), against Leonard's distributive share of the Estate shall be bound by the common language contained in both Connecticut General Statutes sections 17b-94 and 18-85b(b) circumscribing the lien amount to actual costs/expenses—or fifty percent of the assets of the Estate payable to such person—whichever is less. The distributive share of any Estate assets to Leonard, in excess of what the State is entitled to recoup, may be distributed to Leonard.

Dated at Windsor Locks, Connecticut, this 27th day of March, 2018.

/s/

David A. Baram, Judge

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OPINION OF THE CONNECTICUT PROBATE COURT

IN RE: WILLIAM W. BASSFORD

PROBATE COURT, MIDDLETOWN

MARCH 5, 2015

EDITOR'S SUMMARY & HEADNOTES

Testator's Will was contested based on his lack of testamentary capacity and the exercise of undue influence by Testator's Wife. Though Testator had numerous medical and psychiatric conditions, the Court determined that they did not affect him at the time of the Will's execution and, therefore, did not negate testamentary capacity. Additionally, the Court held that Wife's involvement in Testator's affairs as conservator and spouse did not rise to the level of undue influence. Consequently, Testator's Will was admitted to Probate.

1. **Wills: Admission**

   In considering whether to admit a will, a court looks at whether the testator executed the will with the legal formalities required under section 45a-251 of the Connecticut General Statutes, whether the testator had testamentary capacity at the time the will was executed, and whether the testator executed the will free of undue influence.

2. **Undue Influence: Burden of Proof**

   Unlike due execution and testamentary capacity, undue influence is a matter in avoidance and, thus, the burden of proof vests with the contestant. The opponent of the will must prove undue influence not just by a preponderance of the evidence, but by the higher standard of clear and convincing evidence.

3. Undue Influence: Standards Of

The extent of undue influence sufficient to invalidate a will is such that it induces the testator to act contrary to his wishes, and to make a different will and disposition of his estate from what he would have done if left entirely to his own discretion and judgment.

4. Undue Influence: Generally

What influence is "undue" is more a matter of the means used than of the result accomplished when the contending parties are all natural objects of the bounty.

5. Wills: Due Execution

Any person eighteen years of age or older, and of sound mind, may dispose of his estate by will.

6. Testamentary Capacity: Requirements Of

The well-established test for testamentary capacity is whether the testator has mind and memory sound enough to know and understand the business upon which he is engaged at the time of execution.

7. Testamentary Capacity: Generally

A person may harbor insane delusions and yet have testamentary capacity. A delusion can effect testamentary capacity only when it enters into and controls to some degree the making of a will.

8. Testamentary Capacity: Generally

Mere physical weakness or disease, old age, eccentricities, blunted perceptions, weakening judgment, failing memory or mind, are not necessarily inconsistent with testamentary capacity. One's memory may be failing and yet his mind not be unsound. One's mental powers may be weakening, and still sufficient testamentary capacity remain to make a will.

9. Conservatorship: Generally

The fact that a person is under a conservator does not completely prevent his or her acts from having a legal effect under some circumstances.

10. Testamentary Capacity: Effect Of

The crucial time period for determining testamentary capacity is on the very day and at the time of execution.

11. Testamentary Capacity: Evidence

Evidence of a testator's condition both before and after the will is signed is admitted solely for such light as it may afford as to his capacity at that point of execution and diminishes in weight as time lengthens in each direction from that point.

Opinion*

BACKGROUND

William W. Bassford, M.D. ("Dr. Bassford") died on February 19, 2014. He was survived by his wife of over thirty years, Frances Z. Bassford ("Mrs. Bassford"), and three children from a prior marriage: Jonathan Bassford, Andrew Bassford, and Zelda Alibozek ("Bassford Children"). Dr. Bassford left a Last Will and Testament ("Will") dated May 7, 2012, which he distributed various items of personal property to two of his children, certain grandchildren, and one dollar to his son, Jonathan. The remainder of his estate was left to Mrs. Bassford.

The Bassford Children are contesting the Will based on Dr. Bassford's lack of testamentary capacity and the exercise of undue influence on Dr. Bassford by Mrs. Bassford.

Testimony was heard over two days and more than forty exhibits—primarily medical records—were offered to the Court. Each side presented a psychiatrist as an expert witness.

Dr. Bassford was involuntarily conserved by this Court on November 14, 2011, and Mrs. Bassford was appointed conservator of his person and estate. By way of medical history, Dr. Bassford suffered from mild to moderate dementia, anxiety, post-traumatic stress disorder, and recurring urinary tract infections. His history contains numerous hospital and doctor visits and several inpatient psychiatric stays.

ISSUES

[1] There are three basic questions that need to be considered when deciding whether to admit a will:

1. Did the testator execute the will with the legal formalities required under section 45a-251 of the Connecticut General Statutes?

2. Did the testator have testamentary capacity at the time the will was executed?

3. Did the testator execute the will free of undue influence?

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* This Court's ruling was subsequently appealed to, and affirmed by, the Connecticut Superior Court and Appellate Court. *See Bassford v. Bassford*, No. CV156012903S, 2016 WL 1552888 (Conn. Super. Ct. Mar. 24, 2016), *aff'd*, 180 Conn. App. 331 (2018).

PROPER EXECUTION

As to this initial question, the Court finds that the evidence supports the position that the Will was executed with the legal formalities required by statute. *See* Conn. Gen. Stat. § 45a-251 (2015). Two witnesses testified—one in court and one by deposition—as to the circumstances surrounding the execution of the document. Additionally, the Will contained a self-proving affidavit signed by the two witnesses and was acknowledged by a Commissioner of the Superior Court. No evidence was offered by the Bassford Children to show that the execution of the Will failed to meet the requirements of section 45a-251 of the Connecticut General Statutes.

UNDUE INFLUENCE

[2] Unlike due execution and testamentary capacity, undue influence is a matter in avoidance and, thus, the burden of proof vests with the contestant. The contestant of the Will must prove undue influence not just by a preponderance of the evidence, but by the higher standard of clear and convincing evidence. *See* Ralph H. Folsom, *Probate Litigation in Connecticut*, § 1:15 (2d 2012).

[3] The Connecticut Supreme Court discussed the extent of undue influence sufficient to invalidate a will:

> the degree of influence necessary to be exerted over the mind of the testator to render it improper, must from some cause or by some means be such as to induce him to act contrary to his wishes, and to make a different will and disposition of his estate from what he would have done if left entirely to his own discretion and judgment. That his free agency and independence must have been overcome, and that he must, by some dominion or control exercised over his mind, have been constrained to do what was against his will, and what he was unable to refuse and too weak to resist.

Lee v. Horrigan, 140 Conn. 232, 237 (1953) (citation omitted).

[4] Professor Folsom weighed in on the issue when he wrote: "[w]hat influence is 'undue' is more a matter of the means used than of the result accomplished when the contending parties are all natural objects of the bounty. The testator is free to discriminate and they are free to persuade." Folsom, *Probate Litigation in Connecticut*, at § 1:12.

The Bassford Children claim that Mrs. Bassford exercised a "pattern of undue influence" in her dual capacities as conservator and spouse. While it is true that Mrs. Bassford made all appointments—both legal and medical—for Dr. Bassford and accompanied him on all these visits, there was insufficient evidence to meet the standard set forth in the *Lee* case. Innuendo and suspicion alone do not rise to the level of undue influence.

TESTAMENTARY CAPACITY

The critical issue in this case revolves around the question of whether Dr. Bassford had the requisite capacity to execute a will on May 7, 2012.

[5] Connecticut General Statutes section 45a-250 provides that "[a]ny person eighteen years of age or older, and of *sound* mind, may dispose of his estate by will." Conn. Gen. Stat. § 45a-250 (2015) (emphasis added). The statutes do not, however, define the soundness of mind required for the execution of a valid will. It is necessary to look to case law for a description of the level of capacity required to make a will.

[6][7][8] The well-established test for testamentary capacity is whether "the testator [has] mind and memory sound enough to know and understand the business upon which he was engaged at the time of execution." *Stanton v. Grigley*, 177 Conn. 558, 564 (1979) (citing *City Nat'l Bank & Tr. Co.*, 145 Conn. 518, 521 (1958)); *see also Dripps v. Meader,* 94 Conn. 559, 560 (1920). "A person may harbor insane delusions and yet have testamentary capacity. A delusion can affect testamentary capacity only when it enters into and controls . . . the making of a will." *City Nat'l Bank & Tr. Co.*, 145 Conn. at 522 (internal citations omitted). Indeed, it has been said that:

> [m]ere physical weakness or disease, old age, eccentricities, blunted perceptions, weakening judgment, failing memory or mind, are not necessarily inconsistent with testamentary incapacity. One's memory may be failing and yet his mind not be unsound. One's mental powers may be weakening, and still sufficient testamentary capacity remain to make a will.

Dripps, 94 Conn. at 560 (quoting *Richmond's Appeal*, 59 Conn. 226, 245 (1890)).

[9] While no Connecticut cases appear directly on point, a noted treatise stated, "[t]he fact that a person is under a conservator does not completely prevent his or her acts from having a legal effect under some circumstances. For example, he or she may still be able to make a will." Ralph H. Folsom & Gayle B. Wilhelm, *Incapacity, Powers of Attorney, and Adoption in Connecticut*, § 2.4 (3d 1997).

There is no dispute that Dr. Bassford suffered from numerous medical and psychiatric conditions. The Bassford Children's expert witness, Dr. Harry Morgan, a well-known geriatric psychiatrist, testified that Dr. Bassford's "impaired mental state" and "impaired judgment" did not afford him the testamentary capacity to enter a last will and testament. While Dr. Morgan did not personally examine Dr. Bassford, he based his opinion on a review of hospital records.

Mrs. Bassford's expert witness is also a psychiatrist, Dr. Jay Lasser. Dr. Lasser met with Dr. Bassford for approximately one hour on April 20, 2012, about ten days prior to the execution of the Will. He testified that Dr. Bassford knew his relatives and his assets, and that "while he does demonstrate some

deficiencies in immediate recall, this does not prevent him from solidly understanding and consistently explaining . . . the reasons for wanting to change the will, and the results of these changes." Exhibit B, Letter of Dr. Jay Lasser (May 22, 2012).

The drafter of the Will, Attorney Annette Varese Willis, testified that she met Dr. Bassford at his home to discuss the terms of the Will. Thereafter, on May 7, 2012, she drove the two witnesses to Dr. Bassford's home to execute the document. She spent sixty to ninety minutes with Dr. Bassford, in the presence of the two witnesses, to review and execute the Will. Both witnesses were deposed and stated that Attorney Willis reviewed every page of the Will with Dr. Bassford. *See* Exhibit L, p. 9-10; Exhibit M, p. 31-32.

[10][11] The crucial time period for determining testamentary capacity is "on the very day and at the time of execution." *Jackson v. Waller*, 126 Conn. 294, 301 (1940). Evidence of a testator's condition both before and after the will is signed is admitted "solely for such light as it may afford as to his capacity at that point of [execution] and diminishes in weight as time lengthens in each direction from that point." *Id.* (citations omitted).

In this case, while the serious medical and psychiatric conditions of Dr. Bassford were clear, there was no credible evidence that he did not know the natural objects of his bounty or the nature and extent of his property. Thus, the Court finds that William W. Bassford had the requisite testamentary capacity to execute his Last Will and Testament on May 7, 2012.

CONCLUSION

The Last Will and Testament of William W. Bassford dated May 7, 2012 is hereby ADMITTED and the Executrix named therein, Frances Z. Bassford, is hereby appointed as Executrix of the Estate.

Dated at Middletown, Connecticut this 5th day of March, 2015.

/s/

Joseph D. Marino, Judge

QUINNIPIAC PROBATE
LAW JOURNAL

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OPINION OF THE CONNECTICUT PROBATE COURT

IN RE: THE ESTATE OF CHRISTOPHER BYRON, DECEASED

PROBATE COURT, WESTPORT/WESTON DISTRICT

FEBRUARY 28, 2018

EDITOR'S SUMMARY & HEADNOTES

Testator left his entire Estate, in equal shares, to his brother and Petitioner, a woman referred to in his Will as his "caregiver." Testator's only heirs at law were his three adult children, one of whom objected to the admission of the Will on the grounds of undue influence by Petitioner as well as incapacity caused by alcoholism. Petitioner initially came into Testator's life as his dog walker, but she shortly became his "caregiver," despite not having any medical training or expertise with addiction or alcoholism.

Petitioner argued that Testator bequeathed half of his Estate to her because he was grateful for her help. She also asserted that she did not have a fiduciary relationship with Testator in the traditional sense of the term. Petitioner argued that Testator was aware of what he was doing and decided on his own accord to disinherit his children because he was angry at them for abandoning him.

The Court found that though Petitioner and Testator did not have a fiduciary relationship, their relationship was special, and required the heightened standard of proof on the part of Petitioner to disprove by clear and convincing evidence that she exerted undue influence upon Testator. Ultimately, the Court found that Testator was of sound mind during the signing of the Will. Testator controlled his own agenda, continued to communicate with those close to him, and made the decision to disinherit his children on his own.

1. Wills: Testamentary Capacity

Pursuant to Conn. Gen. Stat. § 45a-250, any person eighteen years of age or older, and of sound mind, may dispose of his estate by will.

2. Wills: Execution

Pursuant to Conn. Gen Stat. § 45a-251, a will or codicil shall not be valid to pass any property unless it is in writing, subscribed by the testator and attested by two witnesses, each of them subscribing in the testator's presence.

3. Wills: Testamentary Capacity

Testamentary capacity is a requirement that the testator have mind and memory sound enough to know and understand the business upon which he is engaged at the time of the execution of the will.

4. Testamentary Capacity: Burden of Proof

The proponent of the will must establish by a preponderance of the evidence the issues of due execution and testamentary capacity. The proponent is entitled to a presumption of capacity after available attesting witnesses have been produced and examined upon due execution and testamentary capacity, but, testamentary capacity being a statutory issue, the burden of proof remains on the proponent.

5. Wills: Contesting

Those contesting the admission of a will have the burden of proof in establishing issues of undue influence, fraud, or mistake as matters in avoidance of the will.

6. Undue Influence: Shifting of Burden of Proof

If a confidential or fiduciary relationship is proven, then the burden of proving fair dealing or the burden of showing the absence of undue influence shifts to the defendant or the fiduciary, and that burden must be sustained by clear and convincing evidence.

7. Fiduciary Relationship: Creation Of

The factors to be considered in determining whether a fiduciary relationship exists are characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill, or expertise and is under a duty to represent the other.

8. Undue Influence: Burden of Proof

Unlike in a confidential or fiduciary relationship, the burden of proof is upon the party seeking to establish undue influence or lack of capacity. If a confidential or fiduciary relationship has been established, the burden of proof shifts to the party who had the relationship and the party must show that there was no undue influence.

9. Undue Influence: Generally

The degree of influence necessary to be exerted over the mind of the testator to render it improper is such that it induces the testator to act contrary to his wishes, and to make a different will and disposition of his estate from what he would have done if left entirely to his own discretion and judgment.

10. Undue Influence: Circumstantial Evidence

The existence and exercise of such undue influence is not often susceptible of direct proof. It is shown by all the surrounding facts and circumstances. Undue influence may be inferred as a fact from all the facts and circumstances that are in evidence in the case, even if there be no direct and positive proof of the existence and exercise of such an influence.

11. Undue Influence: Elements Of

There are four elements of undue influence: (1) a person who is subject to influence; (2) an opportunity to exert undue influence; (3) a disposition to exert undue influence; and (4) a result indicating undue influence.

12. Undue Influence: Standards Of

The correct standard of proof is one of "clear and convincing evidence" once the court finds that a fiduciary or special, confidential relationship exists between the testator and the beneficiary.

13. Fiduciary: Representation

A fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other.

Opinion

Christopher Byron's Last Will and Testament ("Will") dated July 29, 2016, was objected to on the grounds of incapacity and undue influence. The objector is his daughter, Janalexis Byron.

Procedural History

Christopher Byron ("Chris" or "Testator") died on January 7, 2017 at the age of seventy-two. On January 19, 2017, Marissa Santangelo ("Marissa" or "Petitioner") filed a petition to probate his Will. The Will was dated July 29, 2016. The Will left Testator's entire Estate to two people in equal shares: Kevin Byron, his brother, and Marissa, referred to in the Will as "my caregiver." Marissa was named Executrix. Testator's three adult children—his only heirs at law—are Janalexis Byron, Nicholas Byron, and Katherine Byron Poats. One daughter, Janalexis, objected to admission of the Will on the grounds of incapacity due to conditions caused by alcoholism, as well as undue influence.

A hearing was held on March 31, 2017. At the hearing, Petitioner and her counsel, Peter Somma, Jr., presented witnesses who testified to the formalities of the Will signing and introduced into evidence a videotape ("Video") showing the signing. The Video was admitted without objection.

On April 5, 2017, the Court issued a decree finding that the requirements of Connecticut General Statutes section 45a-251 were met, since the Will was in writing, subscribed by Testator, and attested by two witnesses, each of them subscribing in Testator's presence. However, the Court also found that there were indicia in the case which gave rise to the claim of undue influence and incapacity. Janalexis requested that the Court appoint a temporary administrator, other than Petitioner, and be afforded the opportunity to perform discovery in advance of a full trial on the admission of the Will.

On April 5, 2017, the Court appointed Robert Grant, Esq. as Temporary Administrator of the Estate to create an inventory, pay certain bills, and report back to the Court on whether there had been any inappropriate conduct on the part of Petitioner when she acted pursuant to a power of attorney granted by Testator.

On May 22, 2017, Mr. Grant submitted a status report to the Court. The Estate consisted of a house located at 22 Old Kings Highway, Weston, Connecticut ("House"), which was valued at $749,000.00, less the value of a reverse mortgage of approximately $151,000.00. There was a checking account in the approximate amount of $30,000.00. Testator also had a retirement account valued at $80,000.00, which named Petitioner and Kevin beneficiaries, as a non-probate asset. There were some debts totaling approximately $30,000.00. Mr. Grant also contacted the IRS to resolve a $10,000.00 liability on Testator's 2015 tax return.

At a further hearing, Mr. Grant reported to the Court that he found no evidence of wrongdoing on the part of Petitioner as an agent pursuant to the power of attorney. By decree dated June 26, 2017, the Court removed Mr. Grant as Temporary Administrator and substituted him with Petitioner as Temporary Administratrix. Petitioner was required to post bond in the amount of $25,000.00, and all Estate funds were to be placed in the Interest on Lawyers

Trust Account ("IOLTA") of Mr. Somma.

A four-day trial on the matter of Janalexis's claims of incapacity and undue influence was held in September of 2017. Each party received time to file post-closing briefs, which included case law. The trial was recorded by a stenographer as stipulated by the parties, and the record has been preserved for appeal.

Summary

Chris was a man of many contradictions. He was a brilliant writer and journalist, yet he never read his own Will. For years he professed to love his wife and children, yet allowed them to walk out of his life because of his addiction to alcohol. During the daytime, Chris was the consummate gentleman, considerate and mannered. At night, Chris was unable to resist his craving for alcohol, often falling down drunk or found in bed fully clothed with his shoes on.

Approximately nine months before Chris signed his Will, a woman named Marissa came into his life. First she was introduced as a dog walker. Within a short time, Marissa became his "caregiver," bill payer, dog walker, file organizer, and purchasing agent. Marissa soon became a full-time employee, and although she did not sleep at the House, her daily services were greatly relied upon by Chris. Most importantly to Chris, Marissa facilitated the regular and continual delivery of vodka, delivered right to the front doorstep.

In this Will contest, a disinherited daughter, Janalexis, argues that her father was not of sound mind while executing his Will due to his alcoholism. She further argues that Marissa exercised undue influence over her father. Moreover, Janalexis asserts that the relationship between Marissa and Chris was a fiduciary one, which meant that Marissa owed Chris a much higher duty of care than that owed by an average person. This has significance in the law regarding the burden of proof to prove one's case. Marissa argues that she was not a fiduciary, Chris knew exactly what he was doing, and she was the innocent beneficiary of Chris's largesse, given his estrangement with his family and his anger at having been abandoned by them. She argues that Chris gave her his money because he was grateful to her.

The Video of the signing of the Will was reviewed again at trial.

Each side presented expert testimony and witnesses who had been friendly with Chris and who could attest to his state of mind and motive. Janalexis also offered testimony from another woman who had taken care of Chris.

The Court reviewed the trial transcript, the cases submitted, and the Video itself numerous times. We begin with the following salient facts.

The Videotape

A videotape of a will signing allows a court, as well as experts and others, to view the event firsthand, or at least as best as a camera will allow. The Court finds relevant the following facts seen in the Video:

The Will was drafted by and the signing of the Will was supervised by Mr. Somma, an attorney with fifty-five years of experience. Mr. Somma testified that in all those years, having drafted hundreds of wills, he could count on one hand the number of times someone had disinherited his children. *See* Transcript of Trial Day 1 at 16, Christopher Byron, No. PD5017-0028 (September 2017). Therefore, Mr. Somma decided to videotape the signing, a technique he rarely used. He asked his paralegal to operate the camera.

Mr. Somma met Chris for the first time on the day of the Will signing. At no time did the attorney ever speak to his client alone, either by telephone or in person during the one day in which they met for the first time.

Chris had not read the Will before he was presented with it for signature. The Will had been emailed to Marissa on July 21, 2016 (Exhibit A), but she had not read it to Chris. Chris did not read the Will at the signing.

Mr. Somma completely and accurately summarized the contents of the Will to Chris during the signing. Chris nodded or voiced his assent throughout. He signed the Will without hesitation. Based on the Video, Chris appeared to this Judge to understand everything said to him.

During the entire Will signing Marissa was present. For most of the time she was standing at Chris's elbow, hovering. For a short time she left to fetch something Chris has asked for.

Looking at the Video, the relationship between Chris and Marissa was one of master and servant. He orders her around, not the opposite.

Chris had no apparent signs of intoxication. He did have a slight hand tremor but this Court is not inclined to infer an impaired state of mind from that. He did not slur any words. He sat up straight throughout the ceremony.

After the Will was signed, Chris was asked to sign a power of attorney, making Marissa his agent. He refused. Marissa then whispered to him, "What's the solution?" Chris ignored her. The power of attorney was not signed.

There did not appear to be any coercion of any kind during the ceremony.

Facts

Chris was a very accomplished writer and journalist. Highly educated, he had attended Columbia Law School and was known for his meticulous attention to detail in his work. He was married for approximately forty years to

Maria Byron ("Maria") before he divorced her. They had three children together: Janalexis, Kate, and Nicholas. Janalexis is an attorney, Kate is a journalist, and Nicholas is an artist. Testimony revealed that Chris had always taken great pride in his children's accomplishments.

Chris developed an addiction to alcohol, which greatly impaired his closest relationships. Janalexis testified, "When I was young, he drank socially . . . . [A]s it progressed along, he would drink too much . . . . Then he would drink and do things that were kind of embarrassing." Transcript of Trial Day 1 at 67. Janalexis testified that her father had trouble keeping jobs, not only because of his drinking but because of what she believed was his narcissistic personality and his "combative relationships with his editors." Transcript of Trial Day 1 at 67-68. Janalexis thought her father "was susceptible to influence from other people who made him feel important and made him feel appreciated and elevated." Transcript of Trial Day 1 at 69. She stated that in the last two years of his life, her father was particularly susceptible to "anyone who wanted to be nice to him because his family had said, '[w]e can't support the way you're living anymore.'" Transcript of Trial Day 1 at 70.

On the night before Kate's college graduation in 2005, Chris left the family, checked himself into a hotel, drank an entire bottle of bourbon, and showed up at graduation confused and crying. Janalexis said that Kate's college graduation turned out to be one of the worst days of Kate's life because of her father's behavior. *See* Transcript of Trial Day 1 at 72.

When Kate became engaged in 2009, she had to specifically instruct her father not to speak at all in front of guests at the engagement party. And later, when Kate was getting married, Kate told her father that he was unwelcome to walk her down the aisle. That was a particularly devastating blow to Chris.

Janalexis testified that Chris's relationship with his three children varied depending on their personalities. Janalexis herself believed that she was the strongest one of the three in standing up to what she deemed to be abusive behavior over the years. She testified that her brother Nick is "a very passive person . . . trying to figure out his career." Transcript of Trial Day 1 at 75. Her sister Kate was eight months pregnant at the time of trial and chose not to "be an active participant because of the stress." Transcript of Trial Day 1 at 76.

Chris's alcoholism took a great toll on his marriage to Maria. Maria's parents lived in Greece and when she would periodically visit them Chris would accuse her of abandoning him. Relevant to Chris's overall state of mind, Maria's parents had paid for all three children's private school educations and their first marital home. Chris was under the impression that his in-laws were very rich and that his children would be provided for in the way of inheritance from their mother's side of the family, no matter what he himself would leave them.

After tumultuous periods of ultimatums and stress, Maria consulted a divorce attorney. When Chris discovered that Maria had gone to an attorney, he

went to his own divorce attorney and sued for divorce as the plaintiff. This was in 2015. On June 7, 2016, Maria and Chris were officially divorced. *See* Transcript of Trial Day 1 at 78.

David Rubin, Chris's divorce attorney, testified at trial as to Chris's intentions with respect to property he would retain after the divorce. Mr. Rubin produced a letter written to him in connection with the divorce, dated March 9, 2016, attached to which was an email written by Chris upon his receipt of the letter. Both the letter and email were admitted as Exhibit 2 ("Rubin Letter"). In the Rubin Letter, Maria's attorney outlines the terms of a divorce settlement that Maria would agree to. The pertinent provision states: "Chris agrees to create a Last Will and Testament by which he gives and devises his interest in the former marital home and the contents thereof to his three children in equal shares *per capita.*"

When Chris received the Rubin Letter, he wrote an email to Mr. Rubin, which the Court finds to be material and highly relevant to this case. The email is as follows, with the emphasis as found in the email:

> 3/11/2016 Dave, hi. So that we are clear:
>
> > I will NEVER agree not to publish Fire & Rain, full-stop and period. I have two publishers who want to take it to market, and I'm wrapping it up day and night as we talk. There is not a single libelous thing in that book and it is going to be published.
> >
> > I will NEVER deed to any of my three children any share of 22 Old Kings Highway, Weston, CT, period. They contributed NOTHING to the development of this place and generally they just complained.
> >
> > Everything else we can talk about, CB.

Transcript of Trial Day 2 at 19.

Of significance is the fact that when Chris died, his only valuable probate asset was the House referred to in the Rubin Letter. This is the only asset that is the actual subject of this litigation, as the liquid funds have already been spent on debts.

Mr. Rubin testified that he knew that Chris was an alcoholic because Chris had told him he was. Yet Mr. Rubin never doubted that Chris was of sound mind during his divorce negotiations. Mr. Rubin also confirmed that Chris was under the impression that his wife's family was quite wealthy and that Mr. Rubin was under that impression as well. *See* Transcript of Trial Day 2 at 21. Mr. Rubin said that Chris was devastated that his children had abandoned him after their intervention to stop his drinking. He said that Chris was completely devastated when his daughter, Kate, got married at the Inn at Longshore and an

uncle from Greece walked her down the aisle instead of her father. Chris told his lawyer that he had been supportive of his children as adults, even giving one child $300,000.00 to buy a condo. In Mr. Rubin's words, Chris felt both "abandoned and persecuted." Transcript of Trial Day 2 at 23. In fact, Chris was adamant with Mr. Rubin regarding the House, even telling him "if we need to go [to] trial over that, we'll go to trial over it, whatever." Transcript of Trial Day 2 at 29. With respect to his relationship with Marissa, Chris referred to her as "his assistant" in all dealings with Mr. Rubin. Transcript of Trial Day 2 at 47.

Mr. Rubin summed up the general state of mind of his client: "I mean, Chris wanted what Chris wanted, not what anybody else didn't want." Transcript of Trial Day 2 at 41. This was to be a recurrent theme throughout the trial, echoed by many friends of Chris.

By the time Chris had written this email to Mr. Rubin, it had been quite some time since any of his children had come to see him.

In late February of 2015, the family hired an interventionist, and all three children, Maria, and the interventionist went to the House to confront Chris about his alcohol use. On February 27, 2015, Chris reluctantly agreed to go to a thirty-day rehab in Pennsylvania. *See* Transcript of Trial Day 1 at 82. Each family member wrote Chris a letter ending with a threat that if he did not finish the thirty-day rehab, such member of the family would end contact with him. Janalexis testified that they were told by the interventionist that it was essential to choose a consequence they would carry out, because otherwise, that would undermine the treatment for the patient. *See* Transcript of Trial Day 1 at 87.

Chris stayed in Pennsylvania for only three days. He neither completed detoxification, nor entered rehabilitation. He called Janalexis, begging her to get him out of there. He was miserable and wanted to leave. He was furious with his family because he had no money, having inadvertently cancelled all his own credit cards. No one would take him home. Chris left anyway, hitchhiking home from Pennsylvania to Connecticut. Once home in Weston, the family again attempted to get him treatment, and Chris entered a local mental health hospital for a few days.

Janalexis visited Chris during his hospital stay in April of 2015. When she told her father that he needed to get help, he told her to "eff off." Whereupon, Janalexis testified, "I had some choice words to him, and I left." Transcript of Trial Day 1 at 115. Chris re-entered another hospital, this time for ten days. Then he left. This was during the beginning of divorce proceedings; Janalexis speculated her father was trying to stay sober to prove to Maria that he could. Unfortunately, after approximately three months, Chris began drinking again. Janalexis was told by her father's physicians, "you've got to stick with the tough love," which was interpreted by Janalexis and the family to mean that they were to refrain from contact until and unless Chris would re-engage in rehab treatment. *See* Transcript of Trial Day 1 at 118.

Janalexis last saw her father on the day he died, after not having seen him for almost two years, from April of 2015 to January of 2017. Chris's Alcoholics Anonymous ("AA") sponsor had called and told her to hurry to the hospital. The family gathered there for a few days and were able to have some meaningful conversations before Chris drifted away.

Janalexis first became aware that Marissa had entered her father's life in November of 2015, when Marissa delivered court documents to her mother on her father's behalf. When all were gathered at the hospital, Marissa was identified as the "health care representative." This designation felt weird to the family, but as Janalexis said "we weren't really in a position to do anything about it." Transcript of Trial Day 1 at 127.

Janalexis testified that "it got difficult after he died, and [Marissa] started trying to exclude us from having anything to do with who would speak at the funeral . . . and she insisted on a priest [even though] we know he wouldn't want this." Transcript of Trial Day 1 at 125. Relations between the Byron family and Marissa deteriorated after Marissa sent them an email, which Janalexis recalled and paraphrased as "[y]ou lost the ability to have any say in what goes on with your father's funeral when you and the rest of the family abandoned him." Transcript of Trial Day 1 at 128.

Notably, at no time did Marissa herself ever block the children from coming to see their father. There was no testimony whatsoever that any attempt made by the children to contact their father was thwarted in any way. Apparently there were no such attempts. Contact was severed.

Upon cross-examination, Janalexis admitted that her father was particularly hurt when he was invited and then disinvited to Kate's wedding in 2015. *See* Transcript of Trial Day 1 at 143. Janalexis also said that she would not have contested the Will if it had merely disinherited the children in favor of her uncle Kevin, or even a close friend. She contested the Will because she found this bequest so uncharacteristic of her father, who was normally such a private man who did not open himself to strangers, and because based on testimony from Marissa's deposition, she believed that Marissa had orchestrated the entire Will process to benefit herself. *See* Transcript of Trial Day 1 at 147.

Testimony revealed that Chris was not merely angry at his children for abandoning him, but he was also very angry at his former wife for trying to impoverish him. Just prior to the divorce, Maria had taken out a home equity line on their marital residence and removed over four hundred thousand dollars in equity. Although Chris was successful in having that money returned to the bank, he was angry at his daughter Janalexis, the lawyer in the family, for assisting Maria in obtaining the money. He felt his former wife had turned his children against him. *See* Transcript of Trial Day 1 at 154.

When asked by the Court to speculate on the reason Chris bequeathed his money to Marissa, Janalexis answered that her best guess was that "I think it

was intended to hurt my mother." Transcript of Trial Day 1 at 157.

Marissa admitted that she was not a caregiver in the sense of having any medical training. In fact, her background is in selling insurance and stocks, and as a compliance officer. Since 2007, when she had an auto accident, Marissa has been earning a living in canine care. Other than her CPR certification, Marissa had no formal medical training of any kind. Marissa claimed to not have had any particular expertise with addiction or alcoholism, but the Court finds it significant that her son had a history of drug addiction and that she often attended AA meetings. First she was hired as a dog walker for Love Your Pet, and within two months, Marissa was working for Chris full-time at a wage of $30.00 per hour, earning approximately $900.00 per week.

Marissa testified that she read Chris's emails for him and that he had trouble reading with his own glasses, which were scratched. Later, his prescription changed. Chris came to rely on Marissa to pay his bills, get him his food, and do lots of other chores that he would assign to her. Marissa attended occasional AA meetings with Chris because he asked her to accompany him there. *See* Transcript of Trial Day 1 at 184.

Marissa never spent the night at Chris's residence. Her testimony was that the relationship was one where "he was in control and the boss." Transcript of Trial Day 1 at 185. If Marissa would suggest they go to the doctor, he would say, "[i]f you keep saying that, you can just go home." Transcript of Trial 1 at 186. On one occasion, Marissa called police anyway, despite Chris threatening to fire her. On that occasion, he had fallen and hit his head. Marissa said that Chris would drink at night, and she would find him in the morning. On that particular morning, he explained that he had fallen the night before and was not getting up. Marissa testified that she never saw Chris drink in front of her, except one time, when he quickly hid the liquor and pretended that it never happened. It took her a few months to realize that Chris was an alcoholic who functioned as a secret drinker, always alone.

The divorce occurred on June 6, 2016. Marissa said that in connection with the divorce, Chris had to change designations to his Individual Retirement Account ("IRA"), and so he made his brother, Kevin, and Marissa, each fifty percent beneficiaries of approximately $100,000.00. As far as the Will, Marissa testified that she did not bring up the subject, but that when Chris raised it, she responded:

> I said that it was a pretty bold move. And that, you know, something to think about, and not take lightly. He was adamant about it. I can't underscore the word 'adamant' enough. And he would relay to me his sense of hurt, abandonment. 'They don't care about me. They have no interest in me' you know, 'they never reply to my emails, they don't reply to my phone calls. They don't care, they don't deserve it.'

Transcript of Trial Day 1 at 195.

When questioned by the Court as to why she thought Chris left her the money, Marissa said "I think he felt grateful to me." Transcript of Trial Day 1 at 197. She said that in rehab, he said "'when we get out of here, I'm going to take you on vacation.' Every day he'd hold my hand and say 'thank you. I really appreciate your help.'" Transcript of Trial Day 1 at 198. She admitted that Chris had loved his wife very much, but stated that he had been deeply hurt by her. Marissa denied that she was in any particular financial peril herself, claiming that she had an eight hundred credit score, owned her own home, and was not indebted to anyone.

On the matter of the Will, Marissa admitted that she had contacted Mr. Somma. Marissa stated that she did not tell Mr. Somma that Chris was an alcoholic and she thought she would be fired if she did so. But she had made the phone call and she had been the one speaking on the phone. Marissa was the person to whom Mr. Somma sent the emailed documents, even though other evidence revealed that Chris did have his own email and used it frequently to communicate with friends. Marissa claimed that Chris was present in the room during the call but could not specifically recall whether Chris had participated. She said the printer was not working in Chris's house, so she had the attorney email the Will to her, and she printed it and brought it to the Chris.

In testimony, Marissa claimed that she had read the Will and reviewed it with Chris and that he had said "'[i]t's you and Kevin, right? And I said, 'Yeah.' And he goes 'not the kids?' and I said 'Yeah.' And he said 'All right.' And that was it." Transcript of Trial Day 1 at 205.

The Court notes that this testimony contradicts the Video, in which Marissa appears surprised when asked by Mr. Somma to confirm that Chris had reviewed the Will with her prior to the signing. In fact, Marissa said "No. I just reviewed it. Was I supposed to [show it to him]?" The Court finds the Video to be a more credible history of these facts than Marissa's later testimony on this issue.

On the issue of Marissa's role with respect to Chris's alcoholism, the testimony was contradictory. Marissa admitted that she would have been fired if she told Chris that she would not assist him in any way to get his alcohol. Marissa stated that she felt maternal towards Chris at times, yet on the subject of his medical appointments and general health, she testified "I was not his parent. He was not my child." Transcript of Trial Day 1 at 234. Marissa said Chris knew she supported sobriety, offering to take him to as many meetings as he would attend. She denied ordering any liquor for Chris. In her words "[h]e wouldn't dare" ask her to do such a thing. Nonetheless, Marissa knew that he was buying liquor when she saw the American Express ("Amex") credit card bills. She claims that she suggested cancelling the Amex card in order to make it harder for him to order liquor, but Chris refused. She continued to insist that "it wasn't her place" to push the issue. Transcript of Trial Day 1 at 212.

Marissa's testimony that she refused to help Chris obtain his liquor was contradicted by testimony given by Robert Dilenschneider, Chris's friend. Mr. Dilenschneider testified that at the funeral Marissa told him, "[t]here was. . . vodka . . . on the front stoop. I took it in for him." Transcript of Trial Day 4 at 65. Mr. Dilenschneider thought "you just don't do that." Mr. Dilenschneider recalled Marissa stating, "I went and got the liquor for him." Transcript of Trial Day 4 at 70. He thought the entire conversation was "tasteless" and remembered being shocked by it, having immediately told his wife about it.

The Court is persuaded that Marissa did assist Chris in obtaining his liquor. She may not have ordered it, but she paid for it and carried it inside.

Marissa stated that she took the responsibility of being Chris's health care representative very seriously. *See* Transcript of Trial Day 1 at 210. She claimed that at various times she would make doctor appointments for Chris but he would cancel them. Marissa said

> [w]e had visiting nurses in January and February, and he discharged them. After rehab -- after the Westport Rehab complex, they ordered 24-hour care . . . . [But] he wouldn't let them in the door. And I called a social worker . . . at Westport Rehab complex. 'What can we do now?'

Transcript of Trial Day 4 at 233-34. Marissa claims she was told to call adult protective services and did so. But Chris would not allow the 24-hour care. The Court notes that the Westport Rehab stay occurred in the fall of 2016, a few months after Chris signed the Will. *See* Transcript of Trial Day 4 at 234.

On the issue of Chris's marked deterioration during the spring of 2016, Marissa claimed that Chris's emotional state played a large role because he lost his wife in the divorce and his children had abandoned him. *See* Transcript of Trial Day 4 at 241. In addition to this, he had gastrointestinal problems that he ignored, and cancelled scheduled doctor appointments. Nonetheless, between April and August 2016, there were no falls or hospital incidents. Marissa said it was a period of relative sobriety, meaning Chris was a little more sober before he signed the Will than afterwards. *See* Transcript of Trial Day 4 at 257.

When Marissa was asked why she thought Chris gave her half the Estate, she said

> I think he did it because he was appreciative of the care, the compassion and the company. He would call me at night, you know, to talk on the phone. Or when he got hurt at night, he'd call me and I'd get in my car and I'd go help him.

Transcript of Trial Day 4 at 273.

Petitioner presented Susan Antilla to testify to Chris's state of mind and motive for disinheriting his children. Ms. Antilla, a colleague in journalism, had

great respect for Chris's abilities. She testified that she heard from Chris in May 2016, after he had read a piece of her work, and had emailed back to her, "[y]ou rock, girl." Transcript of Trial Day 2 at 145. In May, Chris wrote to Ms. Antilla, "[y]ou should meet Marissa Santangelo who is working for me . . . ." Transcript of Trial Day 2 at 147. Ms. Antilla thought that Chris was grateful to Marissa for taking care of him. When asked by the Court, "[d]id [Marissa] ever tell him what to do, do you think?" Susan Antilla responded: "I don't think that anybody ever told Chris what to do. But, I mean, it was more like he would tell her what he needed and then she would do it." Transcript of Trial Day 2 at 148. Later, she repeated in testimony "Chris didn't do things he didn't want to do." Transcript of Trial Day 2 at 153.

Ms. Antilla said that Chris would call her sobbing, saying, "[m]y children abandoned me." Transcript of Trial Day 2 at 150. She was not surprised that Chris left half his Estate to his brother and the other half to Marissa because "I think the only reason he had any dignity in his life in the last year or so was because of her; because she took care of him." Transcript of Trial Day 2 at 151.

Ms. Antilla testified that her correspondence with Chris continued through September of 2016, past the date of the Will signing, and that those were complex conversations. She last saw Chris at the hospital at the end of his life. Ms. Antilla had no doubt that Chris was of complete sound mind when he signed his Will, despite his alcoholism. Another friend of Chris's, who visited Chris and cooked for him regularly, also testified that Chris was completely capable of knowing his own mind in July of 2016.

Janalexis presented two of Chris's friends, Robert Dilenschneider and Susan Granger, who essentially confirmed Petitioner's testimony as to Chris's mental determination and motives.

Mr. Dilenschneider testified that he knew Chris for forty years and spoke to him more frequently as he neared the end of his life. In all that time, Mr. Dilenschneider did not believe Chris was ever intoxicated while they spoke. Mr. Dilenschneider testified that Chris was "bent out of shape" and "extremely upset" after he was asked not to attend his daughter's wedding. And he also testified that Chris had "a deep affection for his brother." Transcript of Trial Day 4 at 54. On the question of family, Mr. Dilenschneider testified that "it became an increasingly tortured experience where he used to say he could never understand why he broke up with the family or the family broke up with him." Transcript of Trial Day 4 at 59. He also testified that he was "very surprised" to learn the primary cause of death was alcoholism. The Court finds this testimony to be credible, buttressing Petitioner's argument that Chris was a skilled secret drinker with an enormous capacity to compensate for the deficits caused by alcoholism.

In describing Chris's personality, Mr. Dilenschneider said Chris was an "in your face" kind of guy; he "can be a pain in the keister." Transcript of Trial Day 4 at 66. Notably, Mr. Dilenschneider said Chris's personality never

changed, and he saw no diminishment in Chris's ability to talk politics throughout 2016, well after the Will was signed. *See* Transcript of Trial Day 4 at 66. Mr. Dilenschneider did not view the Videotape.

Susan Granger testified that she and her husband had been very close friends with Chris and Maria, but Chris never drank in their presence. She had not realized the extent of his alcoholism until Maria left him. In the summer of 2016, Chris was distraught, calling Ms. Granger at all hours of the day and night, until Ms. Granger felt a boundary had been crossed and severed contact with him. Ms. Granger reiterated how angry Chris was at being disinvited to Kate's wedding. After viewing the Video, Ms. Granger was shocked to see how severely Chris's health had deteriorated. *See* Transcript of Trial Day 4 at 113. The Court concludes that this testimony reinforces Petitioner's claim as to motive and state of mind.

Kevin Byron, Chris's brother, also testified. The last time Kevin saw Chris was in 2015, when Kevin came down for Kate's wedding and stopped in to see Chris. Kevin was unable to visit Chris in the hospital as there was a blizzard in Maine where he resides. Kevin said that on the matter of the Will, he was not taking a position pro or con. He said that he was there on behalf of the children.

One day Chris called Kevin on the phone and told him that half of the Estate was "'going to you,' meaning me, and 'half is going to the lady who's been helping me out here.'" Transcript of Trial Day 4 at 81. Kevin said that he heard from Chris that Maria was divorcing him because "she thinks I drink too much." Kevin told him "'I've never seen you drink for years.' So this thing was a complete shock, you know?" Transcript of Trial Day 4 at 83. Kevin believed that Chris made out his Will the way he did because Chris was so angry about being disinvited to Kate's wedding. Transcript of Trial Day 4 at 84. In Kevin's words, "[w]hen Chris got mad, he got mad. And . . . it didn't matter whether he was, you know, drinking or not." Transcript of Trial Day 4 at 84. Kevin also related to the Court the family's very sad history with alcoholism, which ruined both of their parents' lives.

The Court concludes from Kevin's testimony that Chris was familiar with the contents of the Will and intended for the Will to be written the way it was written. Based on what the Court gathered from all witnesses, if Chris was unhappy about something, he let everybody know. Marissa never prevented him from contacting his friends, and indeed he did so frequently. The fact that Chris never complained about his Will after it was signed is evidence to this Court that Chris was satisfied with it.

Mr. Somma testified. The Court asked Mr. Somma if he asked his client why he had disinherited his children. Mr. Somma's response was that he did not ask because he did not want to put it in the public record. When asked by this Judge why he did not meet with his client alone, Mr. Somma answered that he did not think it was necessary. In Mr. Somma's view, Chris was "absolutely fine." The Court reminded Mr. Somma that on the Video, when he asked

Marissa whether Chris reviewed his Will, she replied: "Oh no. I didn't think I was supposed to put it in front of him. I reviewed it."

When this Court asked Mr. Somma why he then did not have any private conversation with Chris when he had not known his client beforehand, and was aware his client was disinheriting his children in favor of his caretaker, he answered that

> I was very confident in what I did and how I prepared it in accordance with his instructions . . . . He was absolutely compos mentis. He was absolutely clear what his decisions and what his mind—how his mind was made up. I've later learned -- but that's neither here nor there. At the time he put the pen to the paper, he was solid.

Transcript of Trial Day 1 at 42. "He had the words at his command. When I was telling him how to sign or where to sign, he says 'wait a minute. I didn't finish my question.'" Transcript of Trial Day 1 at 55. Mr. Somma further said that after the Will signing, Chris engaged him in conversation about some of his ancestors, his household furnishings, and his past.

After the Will was signed, Mr. Somma represented Marissa as her attorney. He prepared a will for her, and the law firm of Somma & Somma is defending her in this action and represents the Estate.

Angela Ramirez, a paralegal employed by Mr. Somma, witnessed the Will signing and operated the device that created the Video. She testified that there was no smell of alcohol on Chris's breath. She said that after the signing, Chris walked around the House and gave her a tour, describing some of his home furnishings and art. Chris did not appear confused and kept normal eye contact. Furthermore, right after she left, she returned to use the bathroom, and Chris opened the door for her and said goodbye again.

Janalexis presented the testimony of Erica Reader, another person who helped care for Chris during the summer of 2016. The Court found her testimony to be passionate, credible, and occasionally disturbing. Ms. Reader testified that she "adored" Chris, who was "fascinating and brilliant . . . [but] an alcoholic." Transcript of Trial Day 4 at 132. Ms. Reader had been introduced to Chris by Marissa, first as someone to assist with the dogs, during May of 2016. Ms. Reader had met Marissa at AA. Transcript of Trial Day 4 at 129. Marissa had told Ms. Reader that Chris was "an alcoholic, that he was wealthy . . . that he wasn't taking care of himself physically . . . [not] paying his bills, eating . . . not in good shape at all . . . wasn't really functioning." Transcript of Trial Day 4 at 129.

Ms. Reader was not happy about Marissa's behavior at all. She said that Marissa cared about the money she was earning more than she cared about Chris: "If she would have taken care of Chris as well as she took care of his

money, I think he would still be alive today." Transcript of Trial Day 4 at 133. Ms. Reader stated that she was "repulsed" by Marissa's attorney and repulsed that Marissa would take the money offered to her. She called it a "character flaw" and said if the money was offered to her, she wouldn't take it, "[n]ot when a man had his own children." Transcript of Trial Day 4 at 137.

Ms. Reader believed that Marissa was helping Chris to stay drunk when he desperately needed medical care. She testified that Marissa would describe herself as "a sober coach." Transcript of Trial Day 4 at 147. And when confronted by Ms. Reader about helping Chris, Marissa would tell her friend that she could not afford to lose the job. In her words, Marissa "got paid well . . . she got to eat her Lindt chocolate, she did her work and did a good job of paying bills, okay." Transcript of Trial Day 4 at 161. However, Ms. Reader did not believe Marissa deserved to get any other money from Chris, particularly because Chris was not being well cared for while under Marissa's care. According to Ms. Reader, his skin had open wounds, and he would sleep in the same clothes, rarely bathing. Ms. Reader believed that Marissa should have had a doctor come visit Chris and some medical professionals there on a regular basis to take care of him. *See* Transcript of Trial Day 4 at 147. But, in her view, Marissa did not want to spend the money on Chris because that "would be money that wouldn't end up in her pocket." Transcript of Trial Day 4 at 199.

Ms. Reader said Marissa used to refer to Chris as having "wet brain" and that she herself observed that Chris had stopped eating, that he was "living on vodka." Transcript of Trial Day 4 at 142. She testified that Chris fell twice in her presence in the summer of 2016, "just hit the ground." Transcript of Trial Day 4 at 144. She said she saw vodka bottles in the bathroom under his sink, in his closet, and at the bar. However, Ms. Reader admitted that Chris was happy and grateful to Marissa that someone was "picking up the mess of his life . . . ." Transcript of Trial Day 4 at 150. And even Ms. Reader admitted there were two sides to Chris. Describing him as "really incredible," she also admitted how angry he could become, for instance, when Marissa's son took his car.

Ms. Reader took it upon herself to be a friend to Chris. She was unhappy that Chris was in Westport Rehab, so she picked him up herself and took him to his home. She cooked for him and would never think of charging him for that.

Ms. Reader knew that Chris adored his ex-wife, his children, and his brother, Kevin, and appreciated all the beautiful cards Kevin had sent. She knew the AA principles where the family says, "it's either the vodka or us." She believed that "that drug [alcohol] hijacked his brain." Transcript of Trial Day 4 at 134.

Ms. Reader clearly believed that Marissa was not the caregiver she presented herself to be and could have done more to help Chris get healthy. But this Court is not persuaded that such a task could have been accomplished by anyone. If Chris's own closest family could not help him, then this Court cannot

assume anyone else could. Marissa testified that Chris cancelled appointments, refused to see doctors, and threatened to fire her if she would be too insistent. This Court believes that Chris showed his charming side to Ms. Reader because he truly appreciated her kindness and caring. But if Ms. Reader had actually been strong enough to remove alcohol, the Court believes she would have been banished from Chris's life.

It is clear that Marissa was not a caretaker in the professional sense of the word; she did not have the training, and a professional health care provider would presumably never have brought the vodka inside. Yet, Marissa held herself out as a caretaker in numerous medical records, and even Mr. Somma, who never himself spoke to Chris, gave her the title of "caretaker" as an adjective in the Will. Ms. Reader's testimony speaks to the character of Marissa, as to whether Marissa was a person disposed to take undue influence over someone else because of her own motives. Ms. Reader testified that Marissa had previously tried to integrate herself into another vulnerable family; Marissa strongly denied that. Ms. Reader insisted that Marissa was in need of money, explaining that she had once loaned $10,000.00 to Marissa; Marissa denied that she was in any financial peril.

The relationship between Marissa and Chris is at the heart of this dispute. This Court concludes the relationship was complex. Both parties were grateful to each other. In this Court's opinion, both parties knew, in their deepest consciences, that what they were grateful for was not really something to be proud of.

The Experts

Petitioner presented Dr. Sundar Ramaswami as her expert witness. Dr. Ramaswami is a clinical psychologist and is the supervising psychologist at the Mobile Crisis Team for the State of Connecticut, Department of Mental Health Services. He has been working in this position for twenty-nine years. Throughout his career, he claimed to have evaluated three to four thousand alcoholics. He is not normally an expert witness, but was doing this as a favor since his friend who was supposed to have testified had recently passed away.

Dr. Ramaswami was of the firm opinion that Chris was not intoxicated when he signed the Will. When asked by the Court "if he was a habitual drinker who needed a certain amount of alcohol every day to like not have DTs or to not lead to withdrawal, does that still mean that within a period of time he can still be very lucid and clear?" Transcript of Trial Day 2 at 68. Dr. Ramaswami responded, "Absolutely. I think it speaks to a habitual drinker to develop certain tolerance and would not suffer the effects that we would. One famous example of somebody actually making good decisions was Winston Churchill." Transcript of Trial Day 2 at 68.

When asked about whether the expert found it significant that during the video, Chris refused to sign a power of attorney when it was placed in front of

him, Dr. Ramaswami said, "It is significant in that he knows what he wants, and he knows what he doesn't want." Transcript of Trial Day 2 at 70.

With respect to a diagnosis of narcissistic personality disorder, Dr. Ramaswami said that the "diagnosis from intake notes at Norwalk Hospital and Silver Hill Hospital speak to clinical incompetence, nothing else." Transcript of Trial Day 2 at 82. Moreover, the expert testified that if Chris did have such a disorder, it would make him less likely to make this Will the way he did, because he "would not be in the company of a mad dog walker, let alone leave money to such person." Transcript of Trial Day 2 at 83. With respect to Janalexis's assertion that Chris had Wernicke/Korsakoff syndrome, Dr. Ramaswami denied it. Rather, he opined that the appropriate diagnosis here is alcohol use disorder, alcohol intoxication, and alcohol withdrawal. He found no evidence of psychosis. Furthermore, he found no evidence of medical treatment of Wernicke, which would have included Diamine, a vitamin B complex. Dr. Ramaswami stated that if the doctors really believed Chris had this diagnosis there would have been evidence of this treatment in the medical records. There was none. With respect to Korsakoff psychosis, Dr. Ramaswami denied that diagnosis because Chris was able to form new memories. Transcript of Trial Day 2 at 101.

Dr. Ramaswami did not deny that at times Chris suffered from confusion when he was acutely intoxicated. However, his opinion was that

> the operative word is judgment . . . . Did he know what he was doing, especially at the time of writing the will? Absolutely in command of judgment. And for the lay people, judgment is the last to go, because the judgment of a seventy-year-old is the product of what we call 'crystallized intelligence' . . . . It's a product of all our learning . . . . So judgment and our learning give us that ability to write a play at eighty, compose at eighty. Mr. Byron is certainly, insofar as alcoholic, like many that I have seen.

Transcript of Trial Day 2 at 106-07.

Dr. Ramaswami was convinced that Chris had capacity when he signed the Will. He distinguished

> a diagnosis of alcohol intoxication, which is science, meaning, one knows the science of—the signs of intoxication, one can take a blood level . . . measure the withdrawal based on tremor . . . . When it comes to personality disorder, often I see the equivalence of voodoo because many of these are guesswork. What somebody—one professional may call a personality disorder, narcissistic, somebody else will say traits, and someone else will say borderline; but if you ask them to come up with a measurable objective test that is consistent. . . we can't say it, because words like insecurity, words like safe,

> feelings of entitlement, inadequacy are not measurable . . . .

Transcript of Trial Day 2 at 128.

He concluded that even though medical evidence disclosed that Chris had neither bathed nor brushed his teeth in months, that did not affect his ability to exercise sound judgment on the day he signed his Will. The Court notes that the medical evidence of bad hygiene was belied by testimony from others that Chris did not smell.

Janalexis presented her own expert witness, Dr. Eric Frazier. Dr. Frazier received a Doctor of Psychology from the Miami Institute of Psychology, identified by the witness as a "professional school in Miami, Florida." Dr. Frazier did not receive a Ph.D or an M.D. He testified that his degree is "tantamount to a Ph.D" with "greater emphasis on being a practitioner versus being a researcher in a career track." Transcript of Trial Day 3 at 33. Dr. Frazier was admitted as an expert without objection.

Dr. Frazier explained that he was doing a forensic evaluation of the case, relying on multiple sources of data without assuming that any particular fact is true. He differentiated that approach from a clinical approach, which assumes that the underlying information given by a person is true. The expert then testified at length as to his sources of information, including a review of records and interviews. However, Dr. Frazier did not interview anyone on Petitioner's side of the matter.

Dr. Frazier believed that because Chris was a daily drinker, his attorney should have known that fact. Further, Dr. Frazier believed that the attorney should have done a mental status exam to properly determine Chris's competence. Dr. Frazier also believed that the attorney should have brought a breathalyzer with him to the Will signing to determine Chris's intoxication. The Court finds that the expectations of the expert are unrealistic and reflect a poor understanding of the role of an attorney in this kind of matter.

On the subject of Marissa and her actions with respect to stopping Chris's drinking, Dr. Frazier testified, "My opinion about that is she could have and she should have." Transcript of Trial Day 3 at 67. The Court finds, however, that the expert knew that Chris's own wife and family could not stop Chris from drinking. Therefore, the Court finds it highly unrealistic and presumptuous for an expert to have expected an employee to do this.

Dr. Frazier did an analysis of the criteria one would use to determine undue influence. He analyzed various risk factors and concluded that Marissa met enough of them to conclude that she had exerted undue influence over Chris. Among the factors he found were: (a) the fact that Marissa's entire job description changed within a short time to a job for which she had no qualifications nor previous experience; (b) what the expert characterized as a "special relationship" in which he found it significant that Marissa was allowed

to swim in the pool; and (c) that Marissa's level of care for Chris was deficient and neglectful because her passive participation in his acute alcoholism prevented him from being healthy. Transcript of Trial Court Day 3 at 71. Dr. Frazier believed that Chris's addiction "hijacked his sound judgment." Transcript of Trial Day 3 at 73.

In a chart of risk factors for undue influence, Dr. Frazier checked a number of boxes. They included "anyone in a position of trust, where the testator is dependent on the person for emotional and physical needs." Transcript of Trial Day 3 at 78. Significant to this Court, the risk factor of "isolation and sequestration" was absent. Other checked factors included a change in family dynamics, recent bereavement as a result of divorce, family conflict, physical disability, personality disorder, and nonspecific psychological factors, such as serious medical illness with dependency and regression. Transcript of Trial Day 3 at 81. Absent were substance abuse, with alcoholism noted, and cognitive mood/paranoia disorders. Also included as present risk factors were "beneficiary instigates or procures the will," "contents of the will include unnatural provisions," "contents favor the beneficiary," "content not in keeping with previous wishes," and "other documents signed at same time." Transcript of Trial Day 3 at 82. In summary, Dr. Frazier concluded that "eighty percent of the psychological risk factors were present, indicating a high risk for undue influence being presented based on case data." The Court, quoting from the report, admitted as evidence the Transcript of Trial Day 3 at 83. *See* Exhibit J.

Dr. Frazier reaffirmed that anyone who tried to get Chris to stop drinking would likely be removed from his life. He also said that the slight hand tremor he observed on the Video was consistent with alcoholism. Dr. Frazier testified that "he was the poster person of a functional alcoholic and could maintain a conversation under the influence of alcohol and could appear as if not to be under the influence of alcohol." Transcript of Trial Day 3 at 95.

Upon cross examination, Dr. Frazier admitted that in all of the medical discharge papers he had read, he did not recall one instance where the hospital recommended a home healthcare aide after discharge. *See* Transcript of Trial Day 3 at 101. He also testified that there was no medical evidence of dementia.

After listening to Dr. Frazier, Dr. Ramaswami retook the stand in rebuttal. In Dr. Ramaswami's opinion, based on his review of the Video, Chris was able to withstand the influence of Marissa and was "emphatic, he has a calm and [is] gently dismiss[ive] of Marissa Santangelo." Transcript of Trial Day 4 at 21. He thought Dr. Frazier's testimony was "absurd" on the subject of whether a functional alcoholic had capacity to make a will. And he found it highly significant that Dr. Frazier did not interview any of Petitioner's witnesses in making his evaluation, because forensic reports are supposed to take in all viewpoints in making their conclusions. He took issue with the forensic report, stating that the conclusions were reached before the practitioner had found the evidence to support them. Transcript of Trial Day 4 at 27. Dr. Ramaswami said that he was a trained forensic psychologist, completed a fellowship in that area,

and that the forensic report submitted by Dr. Frazier did not meet standard professional criteria in any respect, including the fact that it did not begin with the referral question and did not complete a section requiring identifying details.

Dr. Ramaswami concurred that there were risk factors for undue influence in this case. He explained that

> the issue of undue influence has become salient in psychology and psychiatry, because the population is aging, they're living longer, there are multiple families, divorce, stepfamilies, etc. So some years ago, the International Psychogeriatric Association . . . convened a task force to look at guidelines . . . and the test they applied in forensic psychiatry was what they called- I think it's probably well known to legal scholars- is the will substitution test. [In other words], was the free will of the testator controlled, taken over by somebody else, through coercion, compulsion or restraint?

Transcript of Trial Day 4 at 33. Dr. Ramaswami continued:

> So while the risk factors were present, a good forensic psychologist looks for the will substitution test. And that threshold was not met . . . . I went over the video a hundred million times and statements made to the divorce attorney and all that, and I couldn't see it. Because once you reach those risk factors, then you need to be, as Dr. Frazier remarked, you need- you should have an index of suspicion . . . . And then you look carefully at situation specific and you look at the will substitution test carefully.

Transcript of Trial Day 4 at 35.

Dr. Ramaswami acknowledged that it was a serious step for Chris to disinherit his children but was adamant that the entire process, particularly the Video, revealed that no one was forcing Chris to do anything he did not want to do. He believed that Chris did love his children, but also wanted to disinherit them "for reasons best known to them." Transcript of Trial Day 4 at 38. He also took issue with the word "enabling." "As a psychologist, [that word has] been misused and bandied around." He did not think Marissa herself tried to exert undue influence. Transcript of Trial Day 4 at 40.

The Court finds the expert testimony of Dr. Ramaswami persuasive. The risk factors introduced by Dr. Frazier are helpful to this analysis, and certainly many were present in this case. However, the risk factors alone are not determinative. The Court finds that Dr. Ramaswami's analysis, what he referred to as the "will substitution test," is relevant to the legal framework, which controls. The Court finds no evidence of coercion, compulsion, or restraint exercised by another individual on the mind or will of Chris. Indeed, every

witness testified to the complete opposite: no one could ever tell Chris what to do.

The Law

[1][2] Connecticut General Statutes section 45a-250 provides: "[a]ny person eighteen years of age or older, and of sound mind, may dispose of his estate by will." Conn. Gen. Stat. § 45a-250 (2018). Connecticut General Statutes section 45a-251 provides, relevant in part, "[a] will or codicil shall not be valid to pass any property unless it is in writing, subscribed by the testator and attested by two witnesses, each of them subscribing in the testator's presence . . . ." Conn. Gen. Stat. § 45a-251 (2018).

[3][4][5][6][7][8][9] In *Achin v. Pianka*, the court summarized the established case law as follows:

> Testamentary capacity, the 'sound mind' of the statute, is a requirement that the testator have mind and memory sound enough to know and understand the business upon which he is engaged at the time of the execution of the will. The issue of testamentary capacity is focused on the moment of the execution of the will.
>
> The proponent of the will must establish by a preponderance of the evidence the issues of due execution and testamentary capacity. The proponent is entitled to a presumption of capacity after available attesting witnesses have been produced and examined upon due execution and testamentary capacity, but testamentary capacity being a statutory issue the burden of proof remains on the proponent.
>
> In Connecticut, those contesting the admission of a will have the burden of proof in establishing issues of undue influence, fraud or mistake as matters in avoidance of the will . . . . If, however, a confidential [fiduciary] relationship is proved, then the burden of proving fair dealing or the burden of showing the absence of undue influence shifts to the defendant or the fiduciary, and that burden must be sustained by clear and convincing evidence.
>
> The factor[s] to be considered in determining whether a fiduciary relationship exists [are] 'characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the other.' *Albuquerque v. Albuquerque*, 42 Conn. App. 284, 287, 679 A.2d 962 (1996); *Konover Development Corp. v. Zeller*, 228 Conn. 206, 219, 635 A.2d 798 (1994).

> Unlike a fiduciary relationship, the burden of proof is upon the party seeking to establish undue influence or lack of capacity even where there is a confidential relationship between parent and child.

Achin v. Pianka, No. CV054003726, 2010 WL 2573695, at *5-6 (Conn. Super. Ct. May 20, 2010) (some internal citations and quotations omitted). The *Achin* decision states:

> Many years ago this court held the following to be a correct statement of what constituted undue influence sufficient to invalidate a will: '[T]he degree of influence necessary to be exerted over the mind of the testator to render it improper, must from some cause or by some means be such as to induce him to act contrary to his wishes, and to make a different will and disposition of his estate from what he would have done if left entirely to his own discretion and judgment. That his free agency and independence must have been overcome, and that he must, by some dominion or control exercised over his mind, have been constrained to do what was against his will, and what he was unable to refuse and too weak to resist. But that moderate and reasonable solicitation, entreaty or persuasion, though yielded to, if done intelligently and from a conviction of duty, would not vitiate a will in other respects valid.'

Id. at *6 (citing *St. Leger's Appeal from Prob.*, 34 Conn. 434, 442, 449 (1867)).

[10] The *Achin* court elaborated as follows:

> Importunity or threats, such as the testatrix has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort–these, if carried to a degree in which the free play of the testatrix's judgment, discretion, or wish, is overborne, will constitute undue influence, though no force was either used or threatened. The existence and exercise of such undue influence is not often susceptible of direct proof. It is shown by all the facts and circumstances surrounding the testatrix, the family relations, the will, her condition of mind, and of body as affecting her mind, her condition of health, her independence upon and subjection to the control of the person influencing, and the opportunity of such person to wield such an influence. Such an undue influence may be inferred as a fact from all of the facts and circumstances aforesaid, and others of like nature that are in evidence of the case, even if there be no direct and positive proof of the existence and exercise of such an influence.

Id. (citing *In re Hobbes' Appeal*, 73 Conn. 462, 467, 470 (1900); *Dale's Appeal*, 57 Conn. 127, 134, 147 (1888)).

[11] As stated in *Tyler v. Tyler*:

> It is stated generally that there are four elements of undue influence: (1) a person who is subject to influence; (2) an opportunity to exert undue influence; (3) a disposition to exert undue influence; and (4) a result indicating undue influence . . . . Relevant factors include age and physical and mental condition of the one alleged to have been influenced, whether he [or she] had independent or disinterested advice in the transaction . . . consideration or lack or inadequacy thereof for any contract made, necessities and distress of the person alleged to have been influenced, his [or her] predisposition to make the transfer in question, the extent of the transfer in relation to his [or her] whole worth . . . failure to provide for all of his [or her] children in case of a transfer to one of them, active solicitations and persuasions by the other party, and the relationship of the parties.

Tyler v. Tyler, 151 Conn. App. 98, 106 (2014) (internal citations and quotations omitted).

Ordinarily, the burden of proving undue influence is on the party asserting it, by a fair preponderance of the evidence. *See Stanton v. Grigley*, 177 Conn. 558, 565 (1979); *Berkowitz v. Berkowitz*, 147 Conn. 474, 476 (1960). However, the existence of a confidential, fiduciary, or other special relationship will cause the burden to shift to the beneficiary. The *Berkowitz* court explained:

> In will contests, we recognize an exception to this principal when it appears that a stranger, holding toward the testator a relationship of trust and confidence, is a principal beneficiary under the will and that the natural objects of the testator's bounty are excluded. The burden of proof, in such a situation, is shifted, and there is imposed upon the beneficiary the obligation of disproving, by a clear preponderance of the evidence, the exertion of undue influence by him.

Id. at 476-77 (internal citations omitted).

In *Dunham v. Dunham*, the court explained:

> Once a [fiduciary] relationship is found to exist, the burden of proving fair dealing properly shifts to the fiduciary. Furthermore, the standard of proof for establishing fair dealing is not the ordinary standard of fair preponderance of the evidence, but requires proof either by clear and convincing evidence, clear and satisfactory evidence or clear, convincing

and unequivocal evidence.

Dunham v. Dunham, 204 Conn. 303, 322-23 (1987) (internal citations and quotations omitted).

Berkowitz uses the phrase "clear preponderance of evidence." *Berkowitz*, 147 Conn. at 477. *Dunham* says the standard is "clear and convincing evidence, clear and satisfactory evidence[,] or clear, convincing[,] and unequivocal evidence." *Dunham*, 204 Conn. at 322-23. The question is, is there a difference?

First, note that *Dunham* is not an undue influence case. The quoted portion deals with the requirement that a fiduciary prove "fair dealing" by the higher standard. *Id.* There was an undue influence aspect discussed in *Dunham*. However, the court did not decide the issue, as the trial court had never been asked to address it. *Id*. at 327-328.

Tait's Handbook of Connecticut Evidence notes that various cases in different areas use a range of variations, such as "clear and satisfactory," "clear and positive," or "clear and definite." Colin C. Tait & Hon. Eliot D. Prescott, *Tait's Handbook of Connecticut Evidence*, § 3.5.2 (5th ed. 2014). Tait suggests that "[c]ommon sense strongly supports an interpretation that would construe these diverse modes of expression with reference to each other so that one uniform standard would apply to these varied situations." *Id*.

This seems supported by *Alaimo v. Royer*, 188 Conn. 36 (1982). This was a case involving fraud in which it was noted that other cases had cited "clear and satisfactory evidence" or "clear, precise and unequivocal evidence" as the applicable standard. *Alaimo*, 188 Conn. at 39 (internal citations omitted). The court said: "Under either formulation, a plaintiff's burden cannot be equated with the fair preponderance standard of proof for ordinary civil actions." *Id*.

[12] In summation, the Court believes that the correct standard of proof in this case is one of "clear and convincing evidence" once the Court finds that a fiduciary or special, confidential relationship exists between the testator and the beneficiary.

Discussion

In applying the facts to the law, the first question for the Court is whether there existed a fiduciary relationship between Chris and Marissa, as the answer to that question determines who has the burden of proof and what standard of proof is applicable to this case.

A. Was Marissa in a fiduciary, confidential, or special relationship with Chris?

[13] In *Dunham*, the court stated,

[a] fiduciary or confidential relationship is characterized by a

> unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other. The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him.

Dunham, 204 Conn. at 322 (internal citations omitted).

Marissa came into Chris's life as a part-time dog walker in approximately November of 2016. Clearly, she did not begin as a fiduciary. Within a short amount of time, Chris realized that he could rely on her to do a myriad of things for him that would make his life easier. Therefore, he employed her on a full-time basis. Their relationship changed quickly and dramatically. During the spring of 2016, it was Marissa who brought Chris to Norwalk Hospital and identified herself as a caretaker, even though she was not qualified as a health care provider in any way.

Did Chris trust Marissa? Yes. Did he come to rely on her for his every wish and desire throughout the day? Yes. Did Marissa have superior skill or knowledge such that she had a duty to represent his interests above her own? In this Court's opinion, no. Although Marissa held herself out as a caretaker, in fact, she possessed no superior skill or knowledge, and there is no evidence to suggest that Chris believed she had such superior skill or knowledge. At the Will signing, Chris denied her request to make her his agent via power of attorney. In correspondence to his friend, Ms. Antilla, Chris referred to Marissa as "his assistant." In viewing the Video, this Court believes that Chris viewed Marissa as an employee to whom he was grateful, but not as a colleague, advisor, or someone who had more knowledge or control over his life than he did.

However, the Court does find evidence that a special relationship existed between Marissa and Chris because of his dependency on alcohol, which she facilitated. Testimony established that "but for" Marissa's willingness to provide him with liquor, she, like everyone else close to him, would have been excised from Chris's life. By July of 2016, Chris depended upon Marissa for virtually everything in his life, and she took on that burden by adopting the role of "caretaker" and presenting herself as such to medical personnel and others. Therefore, although the Court acknowledges that Marissa was never a fiduciary in the customary sense, because the facts fit those outlined in the *Berkowitz* case cited above, the Court will apply the higher standard of proof required for the proponent of the Will to prove its case. In other words, Marissa must disprove to the Court, by clear and convincing evidence, that she exerted undue influence upon Chris.

B. Was Chris of sound mind for the purposes of a legal standard to execute his Will?

The Court finds by clear and convincing evidence that Chris's mind and memory were sound enough to understand the business that he was doing at the

time he was doing it. The Video shows that Chris clearly understood he was signing his will and comprehended the contents of the document when they were read to him. Chris understood enough about the nature of documents to refuse to sign a power of attorney when presented to him at the Will signing.

C. Did Marissa exert undue influence over Chris, such that, despite being of sound mind, the Will should fail?

As set forth in the *Tyler* case, "there are four elements of undue influence: (1) a person who is subject to influence; (2) an opportunity to exert undue influence; (3) a disposition to exert undue influence; and (4) a result indicating undue influence . . . ." *Tyler*, 151 Conn. App. at 106 (quoting *Pickman v. Pickman*, 6 Conn. App. 271, 275-76 (1986)).

Chris was subject to influence because he liked being flattered and appreciated it. He was lonely and abandoned at the time Marissa entered his life. Marissa had the opportunity to exert influence. In partaking in the process of Chris disinheriting his children in her favor, she engaged in behavior indicating undue influence. According to Ms. Reader, Marissa had the disposition to exert undue influence as well.

The Court believes that Marissa and Chris had a tacit, unspoken bargain that evolved over time and trust. Marissa would continue to turn a blind eye to Chris's need to drink alcohol, and Chris would reward her for that help. The Court believes that Chris was grateful to Marissa for paying his bills and generally cleaning up after him and keeping a semblance of a functional life to outsiders. But internally, Chris was destroyed. He could not stop himself from drinking, and he saw no way to repair his tattered relationship with his family. He felt he was justifiably angry for their abandonment of him in his hour of need.

In analyzing the issue of undue influence, this Court seeks factors that are absent in this case. There was no isolation of Chris from anyone who wanted to see him; on the contrary, Chris controlled his own agenda and continued to communicate with the friends who would stay in his life. Chris disinherited his children, but he genuinely and reasonably believed that they had financial support from their mother and their grandparents, not to mention the fact that they were on their way to becoming competent adults, able to earn their own living in this world. Chris knew that he had given Maria money in the divorce and knew that Maria would bequeath that money to their children. Chris knew that his brother Kevin was not a rich man; the record is replete with evidence that Chris genuinely cared for his brother and was likely happy to bequeath him funds. The Court finds particular significance in the email Chris sent to his divorce attorney, Mr. Rubin, in which Chris specifically said that under no circumstances would his children ever inherit his House, and the House was essentially the sole asset of his Estate.

With respect to giving half of his Estate to Marissa, the Court

understands Ms. Reader's point of view that she believed it was simply wrong and immoral of Marissa to take the money under these circumstances. That is a matter for Marissa's conscience. However, this Court is persuaded that Chris's severe and chronic alcoholism did not prevent him from being capable to decide that he preferred for Marissa to have his money over his own children. His Will was ultimately consistent with the anger that he expressed to any friend who would listen, and to his own divorce lawyer. Chris had told his brother what he was doing. Significantly, Chris expressed no regret to anyone over having signed this Will.

Much was made of the fact that the robust, happy Chris would never have allowed himself to sign a will without reading it first. There is no question in this Court's mind that in July of 2016, Chris was an unhealthy, bitter man. But was Chris so sick as to be under the throes of Marissa's influence, to do something which he would be otherwise unwilling to do? This Court concludes the answer is no. This Court reaches an inescapable conclusion that Chris, embittered and angry, feeling abandoned and alone, and addicted to alcohol, deliberately intended to disinherit his three children. There was no evidence introduced at court to indicate he had remorse or regret or wished to reconsider his Will. The Court finds there is clear and convincing evidence to show that the beneficiary of the Will, Marissa, did not unduly influence Chris to give her half of his Estate.

The Court wishes it could assuage the hurt feelings and damage done to the children of Chris. But all of us are the sum of our choices. Chris chose to keep drinking. The children chose to sever contact with him while he did. This judge is glad that at the very end, the children were able to talk to their father in the hospital, and hopes they can attain some measure of peace.

WHEREFORE, the COURT ORDERS and DECREES the following:

The Will of Christopher Byron is duly proved, and the same is approved and admitted to probate as the LAST WILL AND TESTAMENT of the deceased, and the fiduciary named above is approved, and letters testamentary are hereby issued to the fiduciary.

The fiduciary is allowed twelve months within which to settle the Estate.

All claims against the above Estate be presented pursuant to the provisions of Connecticut General Statutes Chapter 802b.

SO ORDERED.

/s/

Lisa K. Wexler, Judge

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THE LIGHT AT THE END OF THE TUNNEL: WHY THE TIMING IS RIGHT FOR CONNECTICUT TO CONSIDER TORTIOUS INTERFERENCE WITH INHERITANCE AS A VALID CAUSE OF ACTION

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I. INTRODUCTION

Agnes Moriber died, leaving a will stating that her estate was to be divided thirty percent to Judy Markowitza, thirty percent to Gyorgy Emil Sallay, thirty percent Judy Villa, and ten percent to Karol Alexander.[1] Prior to Agnes' death, Villa arranged for Agnes to transfer some of her saving accounts into brokerage accounts, naming Villa as the beneficiary.[2] Villa also arranged for Agnes to name Villa as the beneficiary of other accounts.[3] Because of Villa's actions, when Agnes died, Villa inherited $209,144.11, which was about sixty-four percent of Agnes' estate, instead of the thirty percent she was supposed to receive under the terms of Agnes' will.[4]

Markowitza and Sallay sued Villa for, among other things, tortious interference with inheritance.[5] "Tortious interference with inheritance occurs when a third party intentionally inhibits the beneficiaries' receipt of an expected legacy."[6] The cause of action "provides a plaintiff with the opportunity to

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1 *Markowitz v. Villa*, 63 Conn. L. Rptr. 787, 788 (2017).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id*.

6 Marilyn Marmai, *Tortious Interference with Inheritance: Primary Remedy or Last Recourse*, 5 CONN. PROB. L.J. 295, 295 (1991) (internal citation omitted).

recover for the loss of this 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."[7]

Such an interference can occur in three ways. The first is when a third party interferes "with the testator's acts of execution, alteration or revocation of the will."[8] The second is when a third party's acts "includ[e] suppression, spoliation, destruction or intentional loss of a will."[9] The third is when a third party "might induce an inter vivos transfer which results in a deprivation of inheritance."[10] Thus, this tort "focus[es] . . . on what the defendant did (committed an intentional tort), how it affected the plaintiff (prevented the plaintiff from receiving his expectancy), and the damages the plaintiff suffered (pecuniary damages for the lost opportunity)."[11]

Neither court of binding authority in Connecticut—either the Appellate or Supreme Court—has recognized tortious interference with inheritance as a valid cause of action.[12] However, a majority of Connecticut Superior Courts have come to recognize the tort.[13]

This Note will discuss why Connecticut should address this growing jurisprudence to firmly decide whether the State recognizes tortious interference with inheritance as a valid cause of action. This Note will first address the background and history of the tort. The focus will then shift to the Second Circuit, comparing how Vermont, New York, and Connecticut view the tort. Next, this Note will look at the advantages and disadvantages of Connecticut adopting tortious interference with inheritance as a valid cause of action. Lastly, this Note will address whether the tort should be validated through either legislative or judicial action, ultimately concluding that the better approach is through judicial action. This Note's ultimate conclusion is that it is time for the Connecticut judiciary to hear a case to firmly decide whether this cause of action should be recognized before the State's jurisprudence continues to grow

II. BACKGROUND

To better understand why tortious interference with inheritance is

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[7] 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). The expectancy would be the inheritance or bequest left to an individual through a will, trust, or other documents.

[8] Marmai, *supra* note 6 (internal citations omitted).

[9] *Id.*

[10] *Id.*

[11] Johnson, *supra* note 7, at 771.

[12] *See* Diane J. Klein, *A Disappointed Yankee in Connecticut (or Nearby) Probate Court: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the First, Second, and Third Circuits*, 66 U. PITT. L. REV. 235, 271 (2004); *see also Zupa v. Zupa*, 66 Conn. L. Rptr. 620, 620 (2018).

[13] *See generally* Klein, *supra* note 12, at 271-72; *Zupa*, 66 Conn. L. Rptr. at 620.

important enough to potentially add to Connecticut's jurisprudence, it is important to understand its history. This section will examine: (1) how the cause of action has developed, (2) how the United States Supreme Court has been involved in its development, (3) how the different states in the Second Circuit view and treat the cause of action, and (4) where Connecticut law currently stands.

a. History of Tortious Interference with Inheritance

Tortious interference with inheritance had a somewhat unsteady beginning, only gaining a significant amount of traction after its inclusion in the Restatement (Second) of Torts.[14] However, its initial development began in case law.

i. Prior History

In an early leading case, *Hutchins v. Hutchins*, the plaintiff alleged that the defendants "fraudulently combine[d], confederate[d] and conspire[d] . . . for the purpose of enhancing their own interest in the estate . . . and for the purpose of injuring and defrauding the said plaintiff of his rights which otherwise would have accrued to him as devisee . . . ."[15] The father of the plaintiff was going to devise to the plaintiff 150 acres of farm land through his will.[16] The defendant found out, and "falsely and maliciously represented to the father" that, after the father died, the plaintiff would encumber the father's estate so as to deprive the other children of their share.[17] Due to the defendant's lies, the father revoked his will and executed a new one, whereby the plaintiff was excluded from his father's estate.[18] The court focused on whether such an expectancy was recognized and protected under the law to determine whether the plaintiff alleged a valid cause of action for damages.[19] The court ultimately concluded that the plaintiff failed "to show that he had any such interest in [the estate] as the law will recognize."[20]

About thirty years later, Connecticut saw a case which did protect such an expectancy. In *Dowd v. Tucker*, Frances Hayden created a will, leaving all of her property to the respondent, Tucker.[21] However, after executing her will, Frances decided to execute a codicil to give some of her property to the petitioner, Dowd.[22] When the respondent heard this, he convinced Frances to leave him the property, promising to deed it over to the petitioner so that

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[14] RESTATEMENT (SECOND) OF TORTS § 774B (1979).
[15] *Hutchins v. Hutchins*, 7 Hill 104, 105 (N.Y. Sup. Ct. 1845).
[16] *Id.* at 108.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Hutchins*, 7 Hill at 109.
[21] *Dowd v. Tucker*, 41 Conn. 197, 198 (1874).
[22] *Id.* at 204.

Frances, who was weak with illness, did not have to.[23] The court decided that the case concerned both fraud and property held in trust.[24] The case concerned fraud because, as the court reasoned, "[i]t is the case of one obtaining the conveyance of property by a promise, which he has no intention at the time to fulfill."[25] The case concerned property held in trust because the respondent obtained the property by saying, in effect, "[l]et me have the property by the will you have already executed and I will convey it to the petitioner."[26] These two theories of the case represent an early example of tortious interference with inheritance, with the respondent fraudulently conveying an inheritance that was meant for the petitioner, to himself.

Another early case, *Lewis v. Corbin*, concerned "the defendant [being] charged with having deprived the plaintiff of a legacy, through his fraud in inducing a testatrix to execute the codicil . . . ."[27] The defendant was the executor and residuary legatee of Jane Corbin's will.[28] Jane, who was over eighty years old, decided that she wanted to leave $5,000 to Henry Lewis.[29] The defendant helped Jane leave the money to Lewis through a codicil and was the only witness to that codicil; though the defendant knew that to validly execute a codicil Jane needed two witnesses.[30] The court determined that "if the codicil had not failed for want of due attestation owing to the fraud practiced by the defendant, the plaintiff would have received about $1,650" due to the size of the testator's estate.[31] The court concluded that the plaintiff had alleged sufficient facts to sustain the action of fraud because the defendant "fraudulently procured the making of the codicil without sufficient attestation."[32]

The last important case is *Bohannon v. Wachovia Bank & Tr. Co.* In that case, the plaintiff contended that his grandfather "had formed the fixed intention and settled purpose of providing for the plaintiff and in the distribution of his estate, and would have carried out this intention and purpose but for the wrongful acts of [the defendants]."[33] Those "wrongful acts" included "fraudulent misrepresentations made to the [plaintiff's grandfather]" whereby the grandfather "change[d] a definite plan which he had made to leave to the plaintiff . . . a large share of his estate."[34] The court relied on its reasoning from an older case, where Justice Brewer stated that "[i]t has been repeatedly held

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[23] *Id.*
[24] *Id.* at 205.
[25] *Id.* at 204-05.
[26] *Dowd*, 41 Conn. at 205.
[27] *Lewis v. Corbin*, 81 N.E. 248, 249 (Mass. 1907).
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Lewis*, 81 N.E. at 249.
[33] *Bohannon v. Wachovia Bank & Tr. Co.*, 188 S.E. 390, 391 (N.C. 1936).
[34] *Id.* at 393.

that, if one maliciously interfere[s] in a contract between two parties, and induces one of them to break that contract, to the injury of the other, the party injured can maintain an action against the wrongdoer."[35] Based on this principle, the court concluded that "[i]f the plaintiff can recover against the defendant for the malicious and wrongful interference with the making of a contract, we see no good reason why he cannot recover for the malicious and wrongful interference with the making of a will."[36]

It is clear from the reasoning of these early cases that the idea of a cause of action for tortuously interfering with an inheritance has existed for decades, just under a different name.

ii. Modern History

The more recent history of tortious interference with inheritance began three years after *Bohannon*, when it was recognized in two illustrations of the First Restatement of Torts.[37]

These two illustrations, found in sections 870 and 912(f), seem to suggest a move by the Restatement authors towards validating tortious interference with inheritance as a cause of action. One of section 870's illustrations state:

> A is desirous of making a will in favor of B and has already prepared but has not signed such a will. Learning of this, C, who is the husband of A's heir, kills A to prevent the execution of the will, thereby depriving B of a legacy which otherwise he would have received. B is entitled to maintain an action against C.[38]

One of Section 912(f)'s illustrations state:

> A is a favorite nephew of B in whose favor B tells C, an attorney, to draw a will, devising one-half of B's property to A. C, who is B's son and heir, pretending compliance with his mother's wishes, intentionally draws an ineffective will. B dies believing that one-half of her property will go to A. A is entitled to damages from C to the extent of the net value to A of one-half of the property of which B died possessed.[39]

Although both illustrations demonstrate tortious interference with inheritance,

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[35] *Id.* (quoting *Angle v. Chi., S.P., M. & O. R. Co.*, 151 U.S. 1, 13 (1894)).

[36] *Bohannon*, 188 S.E. at 394.

[37] *See* John C. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 357 (2013).

[38] RESTATEMENT (FIRST) OF TORTS § 870, illus. 3 (1939).

[39] RESTATEMENT (FIRST) OF TORTS § 912(f), illus. 13 (1939).

they had little immediate impact on tort as a cause of action.[40]

However, tortious interference with inheritance received a lot of attention, in the form of various state courts accepting it into their jurisprudence, after the tort's appearance in the Restatement (Second) of Torts.[41] The section states that "[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."[42] This tort "extends to expected inheritances the protection some courts have accorded commercial expectancies."[43] To be within the protection of this cause of action "the plaintiff must prove that the interference involved tortious conduct, which under the cases includes undue influence, duress, or fraud. The tort cannot be invoked if the challenge is based on the testator's mental incapacity."[44] After the publication of the Restatement (Second) of Torts, eleven state supreme courts and eight state appellate level courts recognized the tort.[45]

b. Federal Law

The tort gained even more notoriety through two United States Supreme Court decisions regarding the estate of J. Howard Marshall II.[46] J. Howard Marshall II was married to Vickie Lynn Marshall, more commonly known as Anna Nicole Smith.[47] During their marriage, J. Howard did not include any bequests to Anna Nicole in his will, and instead, according to Anna Nicole,

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[40] Goldberg & Sitkoff, *supra* note 37, at 358.

[41] *Id*. at 361.

[42] RESTATEMENT (SECOND) OF TORTS § 774B.

[43] JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES, 320 (Wolters Kluwer, 9th ed. 2013).

[44] *Id*.

[45] Goldberg & Sitkoff, *supra* note 37, at 361.

The eleven state Supreme Courts are: Florida in *DeWitt v. Duce*, 408 So. 2d 216, 219 (Fla. 1981); Georgia in *Morrison v. Morrison*, 663 S.E.2d 714, 717 (Ga. 2008), among others; Illinois in *In re Estate of Ellis*, 923 N.E.2d 237, 240-41 (Ill. 2009); Iowa in *Huffey v. Lea*, 491 N.W.2d 518, 520 (Iowa 1992), among others; Kentucky in *Allen v. Lovell's Adm'x*, 197 S.W.2d 424, 426-27 (Ky. 1946); Maine in *Harmon v. Harmon*, 404 A.2d 1020, 1024 (Me. 1979), among others; Massachusetts in *Labonte v. Giordano*, 687 N.E.2d 1253, 1255 (Mass. 1997); North Carolina in *Bohannon v. Wachovia Bank & Tr. Co.*, 188 S.E. at 394; Ohio in *Firestone v. Galbreath*, 616 N.E.2d 202, 203 (Ohio 1993); Oregon in *Allen v. Hall*, 974 P.2d 199, 202-03 (Or. 1999); and West Virginia in *Barone v. Barone*, 294 S.E.2d 260, 264 (W. Va. 1982).

The eight state Appellate Courts are: California in *Beckwith v. Dahl*, 141 Cal. Rptr. 3d 142, 148 (Cal Ct. App. 2012); Indiana in *Minton v. Sackett*, 671 N.E.2d 160, 162 (Ind. Ct. App. 1996): Michigan in *Estate of Doyle v. Doyle*, 442 N.W.2d 642, 643 (Mich. Ct. App. 1989); Missouri in *Hammons v. Eisert*, 745 S.W.2d 253, 258 (Mo. Ct. App. 1988); New Mexico in *Doughty v. Morris*, 871 P.2d 380, 383 (N.M. Ct. App. 1994); Pennsylvania in *Cardenas v. Schober*, 783 A.2d 317, 325-26 (Pa. Super. Ct. 2001); Texas in *King v. Acker*, 725 S.W.2d 750, 754 (Tex. App. 1987), *overruled by Archer v. Anderson*, 556 S.W.3d 228 (Tex. 2018); and Wisconsin in *Harris v. Kritzik*, 480 N.W.2d 514, 517 (Wis. Ct. App. 1992).

[46] *See generally Marshall v. Marshall*, 547 U.S. 293 (2006); *Stern v. Marshall*, 564 U.S. 462 (2011).

[47] *Marshall*, 547 U.S. at 293.

"intended to provide for her financial security through a gift in the form of a 'catchall' trust."[48] Respondent was E. Pierce Marshall, one of J. Howard's sons and the ultimate beneficiary of J. Howard's estate because "[u]nder the terms of the will, all of J. Howard's assets not already included in the trust [which benefited Pierce] were to be transferred to the trust upon [J. Howard's] death."[49]

Conflict began even before J. Howard died when Anna Nicole "filed suit in Texas state probate court, asserting that Pierce . . . fraudulently induced J. Howard to sign a living trust that did not include her, even though J. Howard meant to give her half of his property."[50]

Even though this matter started in probate court the first ruling came from a federal bankruptcy court, which became involved after Anna Nicole filed for Chapter 11 Bankruptcy.[51] During those proceedings, Pierce filed a Proof of Claim "alleging that [Anna Nicole] had defamed him when, shortly after J. Howard's death, lawyers representing [Anna Nicole] told members of the press that Pierce had engaged in forgery, fraud, and overreaching to gain control of his father's assets."[52] Anna Nicole filed a counterclaim, stating that Pierce

> prevented the transfer of his father's intended gift to her by . . . effectively imprisoning J. Howard against his wishes; surrounding him with hired guards for the purpose of preventing personal contact between him and [Anna Nicole]; making misrepresentations to J. Howard; and transferring property against J. Howard's expressed wishes.[53]

Anna Nicole's counterclaim essentially alleged that Pierce had tortuously interfered with J. Howard's expected gift to her. The bankruptcy court entered judgement for Anna Nicole on her tortious interference counterclaim.[54] Meanwhile, the probate court found that the will and living trust were both valid.[55]

The matter then moved to federal district court, which found that Pierce had tortuously interfered with Anna Nicole's expectancy.[56] The district court found that J. Howard had directed his lawyers to prepare an *inter vivos* trust for Anna Nicole.[57] Pierce, presumably not wanting to lose a portion of his

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[48] *Id.* at 300.
[49] *Id*.
[50] *Stern*, 564 U.S. at 470.
[51] *Marshall*, 547 U.S. at 300.
[52] *Id*.
[53] *Id*. at 301.
[54] *Id*.
[55] *Id*. at 302.
[56] *Marshall*, 547 U.S. at 304.
[57] *Id*.

inheritance, "conspired to suppress or destroy the trust instrument and to strip J. Howard of his assets . . . ."[58] The district court awarded Anna Nicole $44.3 million in compensatory damages and an equal amount in punitive damages.[59]

The Court of Appeals for the Ninth Circuit reversed, holding that the probate exception bars federal jurisdiction.[60] The probate exception is a judicially created doctrine, stemming from English legal history, which states that probate matters are outside federal court jurisdiction.[61] The Supreme Court reversed the Ninth Circuit's decision because the probate exception "does not bar federal courts from adjudicating matters outside those confines [, being the probating or annulment of a will and the administration of a decedent's estate]."[62] Therefore, since Anna Nicole's "claim does not 'involve the administration of an estate, the probate of a will, or any other purely probate matter . . .'" the probate exception does not apply, and the claim falls within the jurisdiction of a federal court.[63]

The Supreme Court's decision influenced tortious interference with inheritance as a valid cause of action in two ways. "First, the Court gave its imprimatur to the tort by characterizing it as 'widely recognized' and citing section 774B [of the Restatement of Torts]. Second, the Court confirmed the availability of federal jurisdiction for litigation involving the tort, holding that it falls outside of the probate exception to federal jurisdiction."[64]

c. Second Circuit

Within the Second Circuit states—New York, Connecticut, and Vermont—there is disagreement about the validity of tortious interference with inheritance as a cause of action.

i. New York

New York has declined to recognize tortious inference with inheritance as a valid cause of action. Instead, in situations where the tort would be used, New York uses its "well-developed jurisprudence relating to an equitable remedy (the imposition of a constructive trust) . . . ."[65] "[A] constructive trust may be imposed '[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest.'"[66] The elements necessary to find that a constructive trust was created

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[58] *Id*.
[59] *Id*.
[60] *Id*.
[61] *Marshall*, 547 U.S. at 299.
[62] *Id*. at 312.
[63] *Id*.
[64] Goldberg & Sitkoff, *supra* note 37, at 364.
[65] Klein, *supra* note 12, at 282.
[66] *Sharp v. Kosmalski*, 351 N.E.2d 721, 723 (N.Y. 1976) (internal citations omitted).

include: "(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon[,] and (4) unjust enrichment.[67]

An example of the kind of fact pattern that may require the use of a constructive trust is what happened in *Sharp v. Kosmalski*. In *Sharp*, the plaintiff brought an action to impose a constructive trust on the property transferred to the defendant, contending that the transfer of the property solely to the defendant was a violation of trust and confidence and constituted unjust enrichment.[68] After the death of the plaintiff's wife, the plaintiff, whose education did not go beyond the eighth grade, developed a close relationship with the defendant.[69] The defendant assisted the plaintiff in disposing of his wife's belongings, as well as performing certain domestic tasks.[70] The plaintiff proposed marriage to the defendant, but the defendant rejected the proposal; however, notwithstanding her refusal, the plaintiff continued to "shower" the defendant with gifts with the hope that she would accept.[71] Additionally, the defendant was given access to the plaintiff's bank account from which she withdrew substantial amounts of money.[72] Lastly, the plaintiff made a will, naming the defendant as his sole beneficiary and executed a deed naming her the joint owner of his farmhouse, later transferring his remaining joint interest to her.[73] The relationship between the plaintiff and defendant eventually ended when the defendant ordered the plaintiff to move out of the home, which the defendant now owned, leaving the plaintiff with $300.[74]

The court determined that the relationship between the plaintiff and the defendant was the kind "to invoke consideration of the equitable remedy of constructive trust, [but] it remain[ed] to be determined whether [the] defendant's conduct following the transfer of [the] plaintiff's farm was in violation of that relationship and, consequently, resulted in the unjust enrichment of the defendant."[75] The answer to that question "must be determined from the circumstances of the transfer . . . . Therefore, the case should be remitted . . . for a review of the facts."[76] Even though the case was remanded, it is an example of the kind of case where a constructive trust may be used.

ii. Connecticut

The validity of tortious interference with inheritance as a cause of action

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[67] *Id*. (internal citations omitted).
[68] *Id*. at 722.
[69] *Id.*
[70] *Id.*
[71] *Sharp*, 351 N.E.2d at 722.
[72] *Id.*
[73] *Id.* at 722-23.
[74] *Id.* at 723.
[75] *Id*. at 724.
[76] *Sharp*, 351 N.E.2d at 724.

has not yet been decided by a court of binding authority, and the decision is mixed among the superior courts, with the majority holding that it is a valid cause of action.[77]

The first Superior Court decision that upheld the tort as a valid cause of action was *Bocian v. Bank of Am*.[78] The court found it very persuasive that this "cause of action is very similar if not identical to a recognized cause of action in Connecticut; tortious interference with a contractual right."[79]

The idea of recognizing tortious interference with inheritance as a valid cause of action has been floating around Connecticut's jurisprudence for decades. It was first mentioned in *Hall v. Hall*, which discussed the possibility of the tort but declined to recognize it as a cause of action. The *Hall* court stated that

> [a]s to the cause of action for damages for depriving the plaintiff of his inheritance by the defendants' fraudulently procuring the execution of the pretended will in their own favor, the complaint stands on a different ground for it alleges that at the time when the so-called will was executed the testator was mentally incapable of making a will . . . . It is possible that if the complaint had stopped at this point of the narrative, it might have stated a good cause of action against the defendants for fraudulently procuring their incapable father to execute a pretended will in their favor, when coupled with the allegation that they had in fact obtained the benefit of it.[80]

The *Hall* case was cited in a footnote in *Moore v. Brower*, a case where the court was also tasked with determining whether Connecticut should recognize tortious interference with inheritance as a valid cause of action just six months before *Bocian v. Bank of Am*. was decided.[81] The court in *Moore* decided against recognizing the tort, citing the lack of appellate authority and briefing on this cause of action by the plaintiff.[82] However, the court remarked in a footnote that the discussion about the validity of the tort "begs the question of whether Connecticut ought to recognize the tort . . . ."[83] It appears that *Bocian,* and its progeny, took on the challenge of starting the progression of case law towards achieving appellate imprimatur.

Since *Bocian* was decided, a majority of superior court decisions have

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[77] *Markowitz*, 63 Conn. L. Rptr. at 792.
[78] *See generally Bocian v. Bank of Am.*, 42 Conn. L. Rptr. 483 (2006).
[79] *Id*. at 484.
[80] *Hall v. Hall*, 100 A. 441, 443 (Conn. 1917).
[81] *See Moore v. Bower*, 41 Conn. L. Rptr. 681, 684 (2006).
[82] *Id*. at 686 n. 4.
[83] *Id*.

continued to recognize the tort.[84] These courts found persuasive the fact that:

> (1) trial courts are well positioned to determine whether Connecticut is prepared to recognize a developing ground of liability, even where our appellate courts have not expressly adopted such cause of action; (2) tortious interference with an expected inheritance is similar to tortious interference with a contractual right or business relations, which is a recognized cause of action in this state; (3) tortious interference with an expected inheritance is recognized as a valid cause of action by the Restatement (Second) of Torts; (4) the facts involved in an action for interfering with an expected inheritance are distinct from other related causes of action, namely will contests based on fraud or undue influence; (5) our Supreme Court in *Hall v. Hall*, referred to the possibility of this cause of action, even though it did not expressly recognize such an action; and (6) sister jurisdictions have recognized the viability of this cause of action.[85]

However, there are some superior court judges who are waiting for appellate authority before recognizing the tort.[86] Their concern is that the Appellate Court has yet to do a thorough analysis of the tort and define the remedy.[87] However, such an analysis in the past has relied on a number of factors including:

> a growing judicial receptivity to the recognition of the claim[;] . . . genuine public policy mandates[;] . . . the risk of affecting conduct in ways that are undesirable as a matter of public policy[;] . . . whether the new tort complements existing administrative and statutory schemes[;] . . . and whether existing remedies are sufficient to compensate those who seek recognition of a new cause of action.[88]

An additional concern is that these superior courts decisions that have

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[84] *See Van Eck v. West Haven Funeral Home*, No. CV095031256S, 2010 WL 3447830, at *5 (Conn. Super. Ct. Aug. 4, 2010); *DePasquale v. Hennessey*, 50 Conn. L. Rptr. 605, 607 (2010); *Vechiola v. Fasanella*, 55 Conn. L. Rptr. 525, 527 (2013); *Axiotis v. Michalovits*, 57 Conn. L. Rptr. 455, 456 (2014); *Roscoe v. Elim Park Baptist Home, Inc.*, 61 Conn. L. Rptr. 507, 511 (2015); *Reilley v. Albanese*, 61 Conn. L. Rptr. 463, 465 (2015); *Hart v. Hart*, 60 Conn. L Rptr. 399, 403 (2015); *Wild v. Cocivera*, No. CV146050575S, 2016 WL 3912348, at *6 (Conn. Super. Ct. June 16, 2016); *Donato-Nash v. Nash*, 65 Conn. L. Rptr. 594, 596 (2017); *Markowitz*, 63 Conn. L. Rptr. at 792; *Zupa*, 66 Conn. L. Rptr. at 621.

[85] *Markowitz*, 63 Conn. L. Rptr. at 792 (internal citations omitted).

[86] *See generally Eder v. Eder*, 58 Conn. L. Rptr. 347, 349-50 (2014); *Meyer v. Peck*, 46 Conn. L. Rptr. 817, 817 (2008); *Moore*, 41 Conn. L. Rptr. at 685.

[87] Defining the remedy is a valid concern because there can be different forms of remedies such as compensatory or punitive money damages and a constructive trust, among others.

[88] *Zupa*, 66 Conn. L. Rptr. at 621 (internal citations and quotations omitted).

recognized the tort have done so in factually dissimilar cases and have been inconsistent in determining the tort's elements.

However, the superior courts that have upheld the cause of action have been consistent with the elements, requiring "(1) the existence of an expected inheritance; (2) the defendant's knowledge of the expectancy; (3) tortious conduct by the defendant; and (4) actual damages to the plaintiff resulting from the defendant's conduct."[89]

With those elements in mind, it has been noted that the "third element requires more than the fact of interference; it requires interference 'by means that are independently tortious in character' such as 'fraud, duress, defamation or tortious abuse of fiduciary duty.'"[90] Additionally, it was suggested in *Markowitz* that a fifth element should be included, either requiring the exhaustion of probate remedies or alleging that a remedy in probate court is unavailable or inadequate.[91]

iii. Vermont

Vermont falls somewhere between New York and Connecticut, in that Vermont recognizes "the 'expectancy' tort of interference with 'perspective contractual relations,' under Restatement (Second) of Torts Section 767. This tort covers interference with 'a valid business relationship or expectancy.'"[92] Although Vermont does not have any case law on this issue, if the proper case were to present itself, "Vermont might be willing to extend recognition to interference with expectation of inheritance, under Restatement (Second) of Torts section 774B."[93]

III. OTHER POSSIBLE CAUSES OF ACTION?

After reviewing the background and muddled history of the tort, it is necessary to discuss whether such a cause of action should even be included in Connecticut's jurisprudence. The main advantage is that it will fill a current gap in Connecticut's jurisprudence. However, there are some disadvantages to consider, such as the possibility of creating a rival legal scheme between inheritance law and torts. On balance, the advantages appear to outweigh the disadvantages at least to the point where it is safe to advocate for either the judiciary or legislature to decide whether Connecticut will recognize tortious interference with inheritance as a valid cause of action.

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[89] *Id.*

[90] *Id.* (quoting RESTATEMENT (SECOND) OF TORTS, § 774B).

[91] *Markowitz*, 63 Conn. L. Rptr. at 793. My position on this fifth element is more fully explained in Part IV, but, spoiler alert, I think it is a good element to add to help fix certain jurisdictional issues between the probate and superior courts.

[92] Klein, *supra* note 12, at 293.

[93] *Id*.

a. Advantages

The advantage of including such a cause of action is providing a remedy where "the probate court fails by its own standards—that is, when probate proceedings cannot fully correct a wrongful attempt to frustrate the testator's desires."[94] Such a failure can occur when: (1) a tortfeasor is an intestate heir, (2) the would-be beneficiary is without standing, (3) the beneficiary is "cut out" of the will, or (4) there is an *inter vivos* transfer that depletes the estate.[95] An example of the first failure is when both the plaintiff and defendant are siblings and beneficiaries under the will that has been tortuously interfered with.[96] If the plaintiff brings a will contest and is successful, then the defendant will still collect his intestate share.[97] An example of the second failure is when the testator makes a bequest to an unrelated companion or a charitable foundation, but the defendant's tortious conduct prevents the distribution for one reason or another.[98] The intended beneficiary, as neither an intestate heir nor taker under a prior will, lacks standing to bring a will contest.[99] The third failure occurs when the beneficiary is "cut out" of the will through undue influence that induces a testator to replace the name of the beneficiary.[100] The probate court, even if it decided not to probate the will, could not restore the gift or penalize the tortfeasor.[101] In the fourth failure, the defendant could tortuously induce the testator to make an *inter vivos* transfer that depletes the estate.[102] If the defendant is the executor of the will, it is unlikely that the estate will attempt to recapture those lost assets.[103]

Such failures also occur when the defendant's tortious conduct is not one that is challengeable by a will contest, but instead it is just general tortious conduct. As explained in *Hart*,

> there is a difference between an action arising from a will contest concerning the validity or execution of the will and an action arising from a sibling or other party, with knowledge of an inheritance, interfering with receipt of the inheritance by independent tortious means. The first situation involves a challenge to a will such as undue influence or fraud on the testator, but the second action is more appropriately recognized as interference with an expected inheritance. As a matter of

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[94] Klein, *supra* note 12, at 247.
[95] *Id*. at 247-48.
[96] *Id.* at 247.
[97] *Id.*
[98] *Id.*
[99] Klein, *supra* note 12, at 247.
[100] *Id.* at 248.
[101] *Id.*
[102] *Id.*
[103] *Id.*

> public policy, the facts involved in an action of interference with an expected inheritance are distinct from other actions and thus lend themselves to recognition of a distinct tort.[104]

An example of this general tortious conduct includes situations like the one presented in *Wild v. Cocivera*, where there were two beneficiaries under the will, and one of the beneficiaries was the power of attorney for the decedent.[105] In *Wild*, the beneficiary who had power of attorney withdrew at least $81,287.21 from the decedent's accounts and kept the money for himself.[106] The plaintiff brought an action alleging a breach of the defendant's fiduciary obligations, as well as tortious interference with the plaintiffs' expected inheritance.[107] The court concluded that the complaint did not allege sufficient facts for the breach of fiduciary duty claim.[108] The court came to this conclusion because the plaintiff did not allege any facts that would support a finding "that the defendant's conduct occurred because *the plaintiffs* placed their trust and confidence in him such that he undertook to act primarily for their benefit."[109] However, the court concluded that the revised complaint stated a claim for tortious interference with inheritance by alleging that the "defendant diverted and used thousands of dollars from the decedent's bank account while knowing that the decedent's expectation was that such funds would be shared equally with her beneficiaries . . . . [And] that the defendant misappropriated thousands of dollars of the decedent's funds for his own use."[110] Without tortious interference with inheritance, the plaintiff would not have had a cause of action to survive a motion to strike which would have resulted in the defendant keeping the improperly obtained money all to himself.[111]

Therefore, tortious interference with inheritance fills the gap where the probate court and other causes of action are unable to offer a remedy.

b. Disadvantages

Before embracing a new cause of action, it is critical to consider the various critiques and objections levied against it. These critiques have best been best brought to life in *Torts and Estates: Remedying Wrongful Interference with Inheritance* by John C. Goldberg & Robert H. Sitkoff.[112] Even though this influential article was published in 2013, there has not been a response to the

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[104] *Hart*, 60 Conn. L. Rptr. at 404.
[105] *Wild*, 2016 WL 3912348, at *1.
[106] *Id*.
[107] *Id*.
[108] *Id.* at *4.
[109] *Id*.
[110] *Wild*, 2016 WL 3912348, at *7.
[111] In Connecticut, a Motion to Strike is equivalent to a Motion to Dismiss. *See* Connecticut Practice Book § 10-39 (2018).
[112] *See generally* Goldberg & Sitkoff, *supra* note 37, at 335.

arguments against tortious interference with inheritance as a cause of action. This Note does not attempt to be a full response.[113] However, it would be irresponsible not to draw attention to the arguments made by Goldberg and Sitkoff, and to offer some counterpoints to attempt to explain why Connecticut should, at least, consider whether it should recognize the tort.

Goldberg and Sitkoff attack tortious interference with inheritance from two angles, arguing that it is unsound from the perspective of inheritance law and torts.[114]

i. Inheritance Law

The primary argument made against the tort from the perspective of inheritance law is that it will create a rival legal scheme by giving the plaintiff the option to bring either a will contest or a tort case.[115] With this possibility of a rival legal scheme comes different procedures, one used if the plaintiff brings a will contest and one used if the plaintiff brings a tort case. If the plaintiff brings a tort case, there is a concern that those procedures do not adequately protect freedom of disposition or confront the worst evidence rule.[116] Additionally, Goldberg and Sitkoff fear that in the rush to accept the tort, the availability of relief in restitution has been all but forgotten, a remedy that may offer a better solution.[117]

These are serious challenges. However, there are some counterpoints to consider before abandoning all hope. In partial response to the challenge that tortious interference with inheritance will create a rival legal scheme, there is a counterpoint to whether a rival legal scheme is inherently a bad thing. In other areas of law there are overlaps, such as between tort and contract law, where a plaintiff can sue for either a breach of contract, alleging that the defendant acted in a way contrary to the contract, or fraud, alleging that the defendant made a false representation of fact. Although the causes of action are different, the facts are the same, with the plaintiff simply choosing the cause of action that is best supported by the facts. The option to bring either a will contest or a tort case is analogous because the plaintiff is making the same choice, deciding which cause of action is best supported by the facts. By having options of different legal theories with different elements, it is easier for plaintiffs to bring cases which

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[113] This is an influential article that raises serious concerns regarding the wisdom of accepting this tort. As such, this article deserves a full response. However, that is beyond the scope and ambition of this Note.

[114] *See* Goldberg & Sitkoff, *supra* note 37, at 365.

[115] *See id*.

[116] *Id*.

The "worst evidence rule" is the concept that the testator must be dead before the question of whether the testator had capacity is investigated. John H. Langbein, *Will Contests*, 103 YALE L.J., 2039, 2044 (1994). Therefore, the probate court is only left with extrinsic evidence to determine whether the testator had capacity, instead of being able to question the testator himself.

[117] *See* Goldberg & Sitkoff, *supra* note 37, at 365.

seems to be an objective that should be supported.

An additional and perhaps more helpful example is the overlap in guardianship cases where both probate courts and superior courts have jurisdiction. Although this is an overlap in jurisdiction, instead of causes of action, the overlap is more aligned with Goldberg and Sitkoff's concern about the different procedures between will contests and tort cases because probate and superior courts use different procedures.[118]

Probate courts can hold hearings for the removal of a parent as a guardian, as well as the reinstatement of a parent as a guardian.[119] Superior courts can also hold hearings for the removal of a parent as a guardian, as well as the reinstatement of a parent as a guardian.[120] Due to this overlapping jurisdiction, the probate court and superior court administrators have developed a protocol which applies if there are matters pending in more than one court concerning the same child.[121] The protocol determines which court will hear the case.[122]

The probate court and superior court administrators, by working together, have figured reconciled the overlap in jurisdiction without creating a rival legal scheme that destabilizes both systems. This suggests that it is possible for probate courts to share jurisdiction with superior courts when it comes to tortious interference with inheritance by creating a similar system that will clearly spell out when each court will have jurisdiction.

However, the real problem that Goldberg and Sitkoff have with the rival legal scheme is the concern that tort procedures are not as well equipped to protect freedom of disposition and to confront the worst evidence rule. A counterpoint which may address this issue is the option of including an element requiring the plaintiff to exhaust probate remedies before he can file suit in superior court, as suggested in *Markowitz*.[123] This potential element builds on procedures that are already in place. In Connecticut, part of probate procedure is the option of appealing the matter to superior court.[124] In deciding such appeals, the superior court is prohibited from substituting its judgment for that of the probate court, unless the substantial rights of the person appealing were prejudiced.[125] Under such a system, the superior court is bound by the probate

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[118] Probate court procedures are governed by the Connecticut Probate Court Rules of Procedure. Superior court procedures are governed by the Connecticut Practice Book.

[119] *See* CONN. GEN. STAT. § 45a-611 (2018).

[120] *See* CONN. GEN. STAT. § 17a-111b(c) (2018).

[121] *See* Protocol for Overlapping Jurisdiction in Children's Matters Between Superior Court-Family Division and Probate Court, § 2 (2016).

[122] *See id.*

[123] *See Markowitz*, 63 Conn. L. Rptr. at 793.

[124] CONN. GEN. STAT. § 45a-186(a) (2018).

[125] CONN. GEN. STAT. § 45a-186b (2018).

court's determination, a determination that was reached using the court's expertise with protecting freedom of disposition and confronting the worst evidence rule. Therefore, to ensure that the superior court hearing the case benefits from the expertise of the probate courts, an element of the tort could be an exhaustion of probate remedies. With this added element, the plaintiff would not be able to bring a tortious interference with inheritance case in superior court until he has gone through probate court.

The last major concern that Goldberg and Sitkoff have from an inheritance law perspective is the availability of relief in restitution for constructive trust.[126] This is the approach that New York takes.[127] Although it is possible that relief in restitution for constructive trust may fix one wrong by allowing the plaintiff to regain control of lost property, it does not sufficiently address the moral wrong. That moral wrong is the defendant's actions of interfering with the plaintiff's expected inheritance, and the added expense and frustration that the plaintiff now needs to go through to regain his expected inheritance in a time of grief and sorrow.

Borrowing from the general principles of criminal law, "the conviction itself is a form of punishment, carrying with it a social stigma . . . ."[128] The same general principle can be applied here. Simply putting the property into a constructive trust for the plaintiff is not going to fix the injustice. However, punishment will help fix the injustice—as in the kind of punishment that follows from a judgment—in the form of money damages, which are not taken from the estate but from the defendant personally.[129]

ii. Tort Law

The argument made against tortious interference with inheritance as a tort is that it "starts with a claim of collateral damage to the expectant beneficiary resulting from the wrongdoer's violation of the donor's right to freedom of disposition."[130] There lies the problem, because "a core tenet of tort law [is] that the plaintiff must allege that the defendant's conduct infringed on a right personal to the plaintiff."[131]

An exception to this core tenet is wrongful death actions which allow family members of the deceased to bring an action against the defendant for

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[126] *See* Goldberg & Sitkoff, *supra* note 37, at 368.

[127] *See infra* Part II Section c, i.

[128] SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS, 75 (Wolters Kluwer, 9th ed. 2012).

[129] It is possible for the defendant to take the money that he obtained via tortious means to then pay the judgement. However, the judge or jury could award more damages than the defendant took. Additionally, there is still the social stigma of having a judgement documented in a public record against the defendant.

[130] Goldberg & Sitkoff, *supra* note 37, at 379.

[131] *Id*. at 380.

tortuously killing their relative.[132] Tortious interference with inheritance actions are asking for a similar exception. This cause of action is asking for the plaintiff to be able to bring suit against the defendant for his or her part in the plaintiff not receiving his or her inheritance.[133] This is similar to a wrongful death action because under both legal theories the plaintiff is suing the defendant for a tortious action that is done to the decedent before the decedent's death. Since the defendant's action in wrongful death cases caused the decedent's death, and the defendant's action in tortious interference with inheritance cases are usually discovered after the decedent's death, the decedent himself is not in a position to sue the defendant. Therefore, in both wrongful death and tortious interference with inheritance actions, the plaintiff is asking to be able to correct a wrong done to the decedent that the decedent cannot correct themselves.

However, tortious interference with inheritance is different from wrongful death actions because its progression, in Connecticut, has been through the courts, instead of through legislation. This, in and of itself, is telling because these cases concern whether tortious interference with inheritance is a valid cause of action. These cases have been in front of superior court judges who have a lot of experience in hearing tort cases. In fact, the Connecticut judicial system heard 5,396 tort cases between 2016 and 2017, and since each case must begin at the superior court level, that means that superior court judges heard 5,396 tort cases.[134] From sheer numbers alone, it is clear that these are judges who understand the general principles of tort law. With that experience, a majority of superior court judges who have heard a tortious interference case have decided to allow the plaintiffs to proceed with this action even though the harm was not directed at them, but at the decedent.

As mentioned above, these are only partial responses to the challenges that Goldberg and Sitkoff mention, and given the serious nature of these challenges, they deserve a full response. However, given the rapid progression of tortious interference with inheritance in Connecticut, it is time for the legislature or judiciary to confront these challenges and to officially decide whether the State will welcome the tort into its jurisprudence.

IV. RECOMMENDATION

The last piece of the puzzle is the appropriate forum for the discussion of whether Connecticut should recognize tortious interference with inheritance as a valid cause of action, the two options being either the legislature or the

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[132] *Id*. at 382 (internal citations omitted).

An executor or administration of an estate can also bring a wrongful death action. *See* CONN. GEN. STAT. § 52-555 (2018).

[133] Plaintiffs would be confined to being family members or close friends who were expecting an inheritance from the decedent.

[134] *See* State of Connecticut-Judicial Branch, *Civil Cases Added by Case Type*, https://www.jud.ct.gov/statistics/civil/civil_casetypeAdd.pdf (last visited Nov. 2, 2018).

judiciary. In this instance, the best option is for the judiciary to hear a case on the matter because the superior courts have already started the work. The judiciary can also clarify the effect of the *Geremia* opinion on the tort,[135] and it has the necessary experience to address the concerns expressed by Goldberg and Sitkoff. Connecticut also has a history of recognizing new torts through Supreme Court decisions, including wrongful discharge,[136] action for medical provider's unauthorized disclosure of confidential information,[137] and intentional spoliation of evidence.[138] Given this history and the number of torts that have been recognized through Supreme Court decisions, having the judiciary, through either the Appellate or Supreme Court, hear a case is a better alternative than having the legislature decide the validity the tort.

The being said, both approaches have their advantages and disadvantages that scholars have debated for centuries. For example, "[p]roponents of statute law such as Aristotle, Hobbes, and Bentham have stressed the certainty of precisely formulated general rules and the greater legitimacy of laws enacted by the sovereign authority . . . ."[139] This is contrasted with "supporters of case law such as Cato, Burke, and Hayek [who] have highlighted the value of the evolving tradition embodied in the history of judicial precedents."[140]

Proponents of statutorily-based law point to the fact that a statute is predictable. The benefit of such predictability in the legal system is that it "is likely to result [in] more adherence to norms, more productive behavior, fewer disputes, and more settlements."[141] As such, statutes "bind a decision maker to respond in a determined way to some specific triggering facts . . . [and] they minimize the need to time-consuming balancing of all relevant interests and facts."[142] A statute is therefore more efficient because, in applying a statute to a case, a judge already has an analytic formula which he can simply apply to a new set of facts. This helps both attorneys and judges resolve issues more efficiently, which, in turn, saves the judicial system from expending a large amount of resources on simple issues.

However, there are criticisms of statutory-based law which stem from the fact that "[s]tatutes have no intrinsic evolutionary property,[143] and their

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[135] *See generally Geremia v. Geremia,* 125 A.3d 549 (Conn. App. 2015).

[136] *See Sheets v. Teddy's Frosted Food, Inc.*, 427 A.2d 385, 388-89 (Conn. 1980).

[137] *See Byrne v. Avery Center for Obstetrics & Gynecology, P.C.*, 175 A.3d 1, 20 (Conn. 2018).

[138] *See Rizzuto v. Davidson Ladders, Inc.*, 905 A.2d 1165, 1174 (Conn. 2006).

[139] Giacomo A. M. Ponzetto & Patricio A. Fernandez, *Case Law versus Statute Law: An Evolutionary Comparison*, 37 J. LEGAL STUD. 379, 379 (2008).

[140] *Id*. at 379-80.

[141] Luca Anderlini, Leonardo Felli & Alessandro Riboni, *Statute Law or Case Law?*, LONDON SCHOOL OF ECON. & POL. SCI. 1, 9 (2008) http://sticerd.lse.ac.uk/dps/te/TE528.pdf?from_serp=1.

[142] *Id*. at 9-10.

[143] Unless, of course, the judiciary steps in to interpret the statute differently than it has traditionally been

quality simply reflects that of the electoral process."[144] This means that "[s]tatutes provide the short-run certainty of written law, [whereas] stare decisis endows case law with long-run certainty, because case law (unlike statutes) cannot change abruptly, and in the gradual process of distinguishing, countervailing judicial biases tend to cancel out."[145] Statutes, when well written, can fix a problem in the short term, but have little to no long term value because statutes cannot evolve to stay relevant and useful the way case law can. Although statutes can be amended, there needs to be sufficient legislative support for that to occur, and courts can respond more quickly to the changing landscape if presented with the right case.

Unlike statutes, case law can be thought of as an "evolutionary process in which the biases of successive judges offset each other: a process whereby 'the bad will be rejected and cast off in the laboratory of the years,' leading to legal outcomes that are more uniform and of greater value than are the individual judicial decisions considered in isolation."[146] This evolutionary process leads to "greater efficiency and predictability."[147]

However, there are criticisms of case law, the most important being that "judges' self-interest and personal biases play a major role in determining judicial decisions."[148] This flaw becomes even more problematic considering the "vast literature [that] has all but proved that Supreme Court decisions are shaped by ideology at least as much as by precedent."[149] This major flaw of deciding a case based on ideology instead of precedent, especially at the highest court level, has created some very problematic and troubling decisions in the past and will continue to do.[150]

Given the advantages and disadvantages of each approach, it seems that the best approach would be to have the judiciary, specifically the Supreme Court, hear a case.[151] This is the best approach because the Connecticut superior courts

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interpreted. This, in turn, raises concerns generally known as "judicial activism" – a topic that strays from the topic of this Note.

144 Ponzetto & Fernandez, *supra* note 139, at 382.

145 *Id*.

146 *Id*. at 381 (quoting Justice Cardozo).

147 *Id*.

148 *Id*. at 380.

149 Ponzetto & Fernandez, *supra* note 139, at 380 (internal citations omitted).

150 *See generally Scott v. Sandford*, 60 U.S. 393 (1857).

151 A tortious interference with inheritance case can be appealed to the Appellate Court and the Supreme Court can transfer the case itself. *See* CONN. GEN. STAT. § 51-199(c) (2018); Conn. Practice Book § 65-1. The Supreme Court has exercised this power where the law needs to be clarified. *See, e.g.*, *Mazziotti v. Allstate Ins. Co.*, 240 Conn. 799 (1997) (transferring a case for the Supreme Court to determine the res judicata effect of a prior judgement where the defendant was not in privity with the tortfeasor); *Breton v. Comm'r of Corr.*, 330 Conn. 462 (2018) (transferring a case for the Supreme Court to determine the ex post facto clause's effect of applying an amendment to the petitioner); *Browning v. Brunt*, 330 Conn. 447 (2018) (transferring a case for the Supreme Court to determine whether the plaintiffs fit into an exception

have already started the work and the Supreme Court will be able to clarify the effect of the *Geremia* decision.[152] Given the concerns about the tort stated in the last section, the Supreme Court is also in the best position to substantively address those concerns.

Superior courts have already started the heavy lifting of determining whether Connecticut should recognize tortious interference with inheritance as a valid cause of action in the form of motions to strike and motions for summary judgement. The results of those decisions have been addressed in a prior section.[153]

Also addressed in a previous section, an element can be added to the tort, requiring the plaintiff to exhaust probate remedies before bringing the action in Superior Court.[154] However, this element may run into some difficulty given the Appellate Court's ruling in *Geremia*. The court in *Geremia* clearly stated that "[n]either § 45a-98 nor any other provision of the General Statutes vests the Probate Court with jurisdiction, exclusive or otherwise, over those actions sounding in tort."[155] As such, a plaintiff cannot even go to a probate court to try and secure a remedy, which means that a plaintiff cannot exhaust a probate remedy. That being said, if the Supreme Court rules on the issue of allowing tortious interference with inheritance to be a valid cause of action, the court could specify the exhaustion requirement to mean that if there are causes of action which do not sound in tort, those actions need to be first brought in probate court.

An example of a situation where the court could use such an exhaustion requirement is *Reilley v. Albanese*. The case concerned a five-count complaint which alleged "undue influence, incapacity, intentional interference with an inheritance, breach of fiduciary duty, and fraud . . . ."[156] The plaintiff was the daughter and sole heir of the decedent under a will executed on June 6, 2013.[157] "Prior to December 9, 2014, and December 16, 2014, the decedent named the plaintiff as beneficiary of his Cantella & Co., Inc., investment accounts."[158] According to the complaint, the defendant unduly influenced the decedent to purchase items for the defendant and defendant's family. The complaint also stated that the defendant unduly influenced the decedent to gain access to decedent's bank accounts and credit cards.[159] If the courts in such situations

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that would allow the plaintiffs to bring an action against third parties if the trustee improperly refuses to do so).

[152] *See generally Geremia*, 125 A.3d at 549.

[153] *See infra* Part II Section c, iii.

[154] *Id.*

[155] *Geremia*, 125 A.3d at 563.

[156] *Reilley*, 61 Conn. L. Rptr. at 463.

[157] *Id*.

[158] *Id*. at 463-64.

[159] *Id*. at 464.

require an exhaustion requirement, before the plaintiff could bring a claim for tortious interference with inheritance in superior court, the plaintiff would first need to bring the undue influence, incapacity, breach of fiduciary duty, and fraud claim in probate court.

The last reason why the Supreme Court should be the authority to decide this issue is because these courts have the required expertise to address the challenges raised by Goldberg and Sitkoff. Since Goldberg and Sitkoff raise substantive challenges regarding the effect of the tort on the probate and tort systems, the judiciary, by virtue of having experience with both areas of law, is in a better position to address those and other concerns than the General Assembly.

V. CONCLUSION

All in all, the time is ripe for the judiciary to hear a case concerning whether Connecticut should recognize tortious interference with inheritance as a valid cause of action. Given the challenges that Goldberg and Sitkoff address in their article about the stability of the tort, and the superior court judges who are either unaware of these concerns, or who are not addressing them, the Connecticut judiciary needs to respond before the jurisprudence regarding tortious interference with inheritance continues to grow. The growing jurisprudence becomes more of an issue every day as more Superior Courts are tasked with deciding for themselves whether the tort should be recognized.[160] As demonstrated above, there are certain actions that Connecticut can take to mitigate against these concerns, but in order for the State to take the appropriate action, Connecticut needs to be clear as to whether it will even recognize the tort.

[160] There have been three decisions involving tortious interference with inheritance in 2018. *See generally Solon v. Slater*, No. CV156026286S, 2018 WL 632344 (Conn. Super. Ct. Jan. 8, 2018); *Zupa*, 66 Conn. L. Rptr. 619; *Vaicunas v. Gaylord*, No. CV146053845S, 2018 WL 3814971 (Conn. Super. Ct. July 20, 2018).

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