Folks:

Take-Away: It is not clear if a plaintiff's cause of action for the tortious interference with an inheritance, expectancy, or a gift is viable in Michigan Courts. One Court of Appeals panel says that this cause of action may be pursued in Michigan, while three other panels either say 'no,' or 'we are not sure.' Such a cause of action, if viable in Michigan, would permit a lawsuit to be filed against a third party, but not necessarily involve a Will contest, a Trust contest, or a challenge to a 'final' beneficiary designation.

Background: Many states recognize the common law cause of action for the tortious interference with an expectancy, or an interference with an inheritance. Such a claim is brought directly against the claimed wrongdoer and is, at times, filed to avoid triggering a 'no contest' provision contained in a Will or a Trust.

The *Restatement (Second) of Torts, Section 774(B) (1979)* recognizes the cause of action for the tortious interference with an expectancy, or interference with an expected inheritance, describing it as: "*A civil lawsuit that is filed if one is an intended beneficiary who was deprived of some or all of their inheritance due to the actions of a third-party.*"

Several states like Florida, Wisconsin and California have longstanding histories that recognize this cause of action. Even the United State Supreme Court, in *Marshall v. Marshall, 547 U.S. 293 (2006)* [the infamous Anna Nicole Smith litigation] recognized this cause of action at common law. For some reason, Michigan courts are highly reluctant to expressly recognize the cause of action as a means to rectify an injury that is caused by another. [Texas is another state that recently refused to recognize this separate cause of action.]

Why? Why this cause of action is unique is because it is a claim that is filed as a

civil complaint, often outside of the probate court. Sometimes this claim can be filed even after the probate of the decedent's estate is closed. Some states, like Florida, which permit the cause of action, only require as a condition to the lawsuit that the plaintiff exhausted his/her remedies in the probate court proceedings. As noted, such a claim might be filed to avoid directly challenging the validity of a Will or Trust which contains a 'no contest' clause. Or sometimes potential challenges to a Will or Trust's validity in the probate court face very short statutes of limitations, which might be much shorter than a common law tort claim for tortious interference which might carry a 2 to 3 year statute of limitations.

Why Not?: Often the reasons given why a state refuses to recognize the cause of action for the intentional interference with an inheritance or gift is that it has concluded that its probate code with its rules, procedures, and processes affords sufficient remedies to someone who feels that his/her interests in the decedent's estate have been harmed by the actions of others, e.g., remedies like equitable recoupment, constructive trust, disgorgement of assets, such that a separate cause of action [available in another court] is neither warranted nor consistent with the state's express public policy.

Michigan History: Suffice it to say that Michigan courts are 'all over the map' when it comes to the recognition of the cause of action for tortious interference with an inheritance, gift or expectancy.

> **Yes, It is Recognized:** In *In re Green,* No. 17335 Michigan Court of Appeals (August 16, 1996), the Court panel formally recognized this common law cause of action. This decision went so far as to even identify the elements of the cause of action for the tortious interference with an inheritance or expectancy: (i) the existence of an expectancy; (ii) intentional interference with that expectancy; (iii) interference that involved conduct tortious in itself, such as fraud, duress, or undue influence; (iv) reasonable certainty that the devise or bequest to the plaintiff would have been received had the defendant not interfered; and (v) damages sustained by the plaintiff. Unfortunately, this was an unpublished decision of the court, which means that it is does not act as

a binding precedent.

Not Yet, We're Just Waiting for the Legislature: In *Dickshott v. Angelocci,* No. 241722 Michigan Court of Appeals (June 17, 2004) the Court panel refused to recognize the cause of action of tortious interference with an expectancy, stating only that the Michigan Supreme Court or the Legislature must formally recognize the cause of action before a plaintiff could assert it as a basis of recovery in a lawsuit. The Supreme Court denied leave to appeal this Court of Appeals decision.

Not Yet: In *Charfoos v. Schultz,* No. 283155 Michigan Court of Appeals (November 5, 2009), the Court concluded that "*Michigan courts have not yet recognized intentional interference with an expected inheritance as a valid cause of action in this state."*

No Published Authority: In *In re Carter Estate,* No. 303364 Michigan Court of Appeals (May 31, 2012) it found that that the alleged tort of intentional interference with an inheritance is not a recognized cause of action in Michigan: "*[T]here is no published case law or statutory provision that supports such a claim."*

We're Not Saying Yes or No: In *In re Bandemer,* No. 293033 Michigan Court of Appeals (October 12, 2010), the Court panel referenced the *Green* decision, but then it promptly commented that it "*assumed without deciding that a cause of action exists for tortious interference with an expected inheritance or gift."*

No, Michigan Does Not Recognize It: Most recently in *Biondo v. Shellenberger,* No. 346890, Michigan Court of Appeals, (July 28, 2022) the Court panel expressly refused to recognize the cause of action for interference with an inheritance or expectancy, stating that *"Michigan does not recognize 'tortious interference with an expected inheritance' as a cause of action.*" Yet, in order to reach this conclusion, the Court of Appeals panel cited the several earlier Michigan unpublished decisions, including *Green, Dickshott,* and *Bandemer,* in which those decisions did

not expressly find that the cause of action did *not* exist- in *Green,* it actually did (going so far as to identify the elements of the tort claim), while in *Dickshott* and *Bandemer* those decisions simply 'punted' on the question in search of more direction from the Legislature or the Supreme Court. In addition, the Court in *Biondo '*poured salt in the wounds' of the unsuccessful plaintiffs when it awarded sanctions against them for 'vexatious litigation.' In doing so, the Court stated:

"Because this decision [Green] is unpublished, it is not binding precedent. MCR 7.215(C)(1). Moreover, the decision relied upon, Estate of Doyle, 177 Mich App at 549, merely cites the Second Restatement of Torts.

Decisions decided after In re Green make clear that this state has not recognized tortious interference with an expected inheritance as a cause of action. Because this cause of action does not exist, allowing plaintiffs leave to amend their complaint to add such a claim would be futile. Therefore, the probate court did not abuse its discretion when it denied plaintiffs' motion for leave to amend."

Conclusion: With the *Biondo* decision, most plaintiffs will be highly reluctant to pursue such a claim for tortious interference with an expectancy or inheritance if they know that they will be sanctioned by the trial judge for even raising the claim [in the pursuit of a cause of action that the U.S. Supreme Court acknowledged to exist at common law in its *Marshall decision*.] Getting the Michigan Legislature to do anything will take something on the order of an 'Act of God.' One even wonders how the Michigan Supreme Court will ever have the occasion to rule on the viability of the cause of action for tortious interference with an inheritance or expectancy if prospective litigants fear that they will be punished in the lower courts for even asserting such a claim. So, we wait, and wait, and wait..

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