THE TORTIOUS LOSS OF EXPECTANCIES, A LOST OPPORTUNITY FOR DETERRENCE, AND THE LIGHT AT THE END OF THE TUNNEL, *IN RE ESTATE OF ELLIS*, 923 N.E.2D 237 (ILL. 2008)

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I. INTRODUCTION

Although tortious interference with an expectancy[1] has been the subject of evaluation as far back as 1917,[2] it was not until 1981 that the cause of action was recognized in Illinois.[3] Over time, the tort has gradually gained widespread recognition in the United States.[4] However, whether tortious interference with an expectancy is a separate cause of action[5] or merely a last recourse[6] when a probate remedy would be inexistent or inadequate is dependent upon jurisdiction.[7] In Illinois, courts recognize the tort as a last recourse,[8] not as a separate cause of action.

As a way to establish a deterrent to future tortious acts, Illinois needs to establish tortious interference with an expectancy as a separate cause of action, not merely a last recourse. While successful tort litigants are given an opportunity for broad recovery, including pre-judgment interest, litigation costs, emotional distress, and most importantly, punitive

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* J.D. Candidate, Southern Illinois University School of Law, May 2013. I would like to thank Professor Alice Noble-Allgire, Professor of Law at Southern Illinois University School of Law, for her helpful feedback.

1. "One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift." RESTATEMENT (SECOND) OF TORTS §774B (1979).
2. *See* M.B., Comment, *Tort Liability for Depriving the Plaintiff, Through False Representations, of an Expected Inheritance*, 27 YALE L.J. 263 (1917).
3. Nemeth v. Banhalmi, 425 N.E.2d 1187, 1191 (Ill. App. Ct. 1981).
4. *See generally* Marilyn Marmai, Note, *Tortious Interference With Inheritance: Primary Remedy or Last Recourse*, 5 CONN. PROB. L.J. 295 (1991); Martin L. Fried, *The Disappointed Heir: Going Beyond the Probate Process to Remedy Wrongdoing or Rectify Mistake*, 39 REAL PROP. PROB. & TR. J. 357 (2004); Diane J. Klein, *River Deep, Mountain High, Heir Disappointed: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Mountain States*, 45 IDAHO L. REV. 1 (2008).
5. *See* Huffey v. Lea, 491 N.W.2d 518, 520 (Iowa 1992); Peffer v. Bennett, 523 F.2d 1323, 1325 (10th Cir. 1975).
6. *See* Marmai, *supra* note 4, at 296.
7. *Id*.
8. Robinson v. First State Bank of Monticello, 454 N.E.2d 288, 293-94 (Ill. 1983).

damages,[9] these legal remedies are not recoverable through an equitable will contest.[10] Because Illinois limits tort claims to a last recourse, there is little to deter individuals from acting in bad faith. For example, if *X* tortuously interferes with the expectancy of *Y*, *Y* is forced to go through a will contest to seek corrective action. If *Y* wins, *X* is not punished, but is put back in the place he or she was before inexorably interfering with another's property. If *Y* knows of the tortious acts, but fails to take corrective action within the six-month statutory period, *X* is able to steal *Y*'s inheritance. Therefore, if one thinks they can tortiously interfere with another's expectancy, so as to procure a benefit for themselves, they have nothing to lose by "going for it."

Unfortunately, this scenario is the current state of affairs in Illinois. Accordingly, it seems appropriate to prevent tortious interference with expectancies in the future. To accomplish this feat, Illinois needs to establish tortious interference with an expectancy as a separate cause of action, not merely a last recourse. Therefore, when the court failed to adopt this approach in *In re Estate of Ellis*,[11] it missed an excellent opportunity to ensure that future tortfeasors know that "no wrong is without a remedy."[12]

Before an individual may bring a claim for tortious interference with an expectancy in Illinois, there are two prerequisites: (1) all remedies via will contest must be exhausted;[13] and (2) a will contest must be unable to provide the injured party with adequate relief.[14] In *Ellis*, the court first addressed the question of whether the six-month statute of limitations for a will contest also applied to claims for tortious interference with an expectancy, so as to bar recovery to individuals who fail to take action within this statutory period.[15] After considering the facts of the case, the *Ellis* court justly broadened the rule and established that this was not the case when the victim did not have a fair opportunity to pursue a remedy in probate court because they were not aware of the tortious conduct until after

9. Illinois courts have already acknowledged that the expectation of punitive damages alone is insufficient to warrant a will contest as inadequate relief. *In re* Estate of Hoover, 513 N.E.2d 991, 992 (Ill. App. Ct. 1987).

10. Diane J. Klein, *The Disappointed Heir's Revenge, Southern Style: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Fifth and Eleventh Circuits*, 55 BAYLOR L. REV. 79, 88-89 (2003).

11. 923 N.E.2d 237 (Ill. 2009).

12. Upon the adoption of the cause of action in Illinois, the court held that "no reason exists not to extend the protection" to an expectancy inheritance because it is "a principle of justice that no wrong is without a remedy." Nemeth v. Banhalmi, 425 N.E.2d 1187, 1190 (Ill. App. Ct. 1981).

13. *In re* Estate of Knowlson, 562 N.E.2d 277, 280 (Ill. App. Ct. 1990); *In re* Estate of Hoover, 513 N.E.2d 991, 992 (Ill.App.Ct. 1987).

14. *Ellis*, 923 N.E.2d at 240-43; Robinson v. First State Bank of Monticello, 454 N.E.2d 288, 294 (Ill. 1983); Estate of Jeziorski, 516 N.E.2d 422, 427 (Ill. App. Ct. 1987).

15. *See Ellis*, 923 N.E.2d at 240.

the six-month statute had expired.[16] Nevertheless, the court missed an opportunity to bring complete illumination to the matter and establish a deterrent against future acts.

Illinois would not be alone in its adoption,[17] and tortious acts would see much-awaited deterrence.[18] The new exception to the six-month limitation period to file a will contest was a great advancement, but in order to ensure the establishment of much needed deterrence in the current system, Illinois needs to take a broader approach and establish tortious interference with an expectancy as a separate cause of action.

In summary, Section II of this Note explores the history of tortious loss of an expectancy: the rise of the cause of action in Illinois and the development of the cause of action over time. Section III examines the Illinois Supreme Court's opinion in *Ellis*. Finally, Section IV analyzes the *Ellis* court's decision in the current and future context, including the strengths and weakness of the court's decision, and the opportunity for future change.

II. BACKGROUND

This Section explores the history of tortious interference with an expectancy. Accordingly, this Section will begin with the rise of the cause of action in Illinois. Subsequently, the development and evolution of the action within the state will be discussed.

A. The Rise of the Cause of Action in Illinois

Prior to the acceptance of tortious interference with an expectancy in Illinois, victims of such acts were given a simple ultimatum: file a will contest or receive no remedy. Illinois has a six-month statute of limitations for interested persons[19] to file a will contest, and this statute begins to run

16. The Supreme Court held that the six-month limitation period to file a will contest did not apply to a tort claim for intentional interference with an expectancy of inheritance where the victims did not have a fair opportunity to pursue a remedy in probate court because they were not aware of the tortious conduct until after the six-month deadline and the will contest would not have provided sufficient relief in that it would not have extended to alleged inter vivos transfers of property. *Ellis*, 923 N.E.2d at 243.

17. *See* Huffey v. Lea, 491 N.W.2d 518, 520 (Iowa 1992); Peffer v. Bennett, 523 F.2d 1323, 1325-26 (10th Cir. 1975).

18. As indicated by the majority of jurisdictions and the growing number of states to accept tortious interference with an expectancy as a cause of action. *See* George L. Blum, *Action for Tortious Interference with Bequest as Precluded by Will Contest Remedy*, 18 A.L.R. 5TH 211 (1994).

19. "Interested person," under this Act, means "one who has or represents a financial interest, property right or fiduciary status at the time of reference which may be affected by the action, power or proceeding involved, including without limitation an heir, legatee, creditor, person entitled to a spouse's or child's award and the representative." 755 ILL. COMP STAT. § 5/1-2.11 (1988).

after the admission of a will to probate.[20] This six-month limitation period for filing a will contest is "jurisdictional and not subject to tolling by fraudulent concealment or any other fact not expressly provided for by the Probate Act."[21] The six-month statute of limitations was established to create stability in the administration of estates, and due to the gravity of interest involved, to make that administration as orderly as possible.[22] If an interested person fails to file a direct claim to contest the will within the statutory period, the validity of a will is established for all purposes.[23] To do otherwise would "give plaintiffs a second bite of the apple and defeat the purpose of the exclusivity of a will contest."[24]

To counter the strict rules associated with will contests and "in the principle of justice,"[25] Illinois has taken substantial steps to broaden the available remedy to victims of such intentional acts. Although tortious interference with an expectancy has been the subject of evaluation as far back as 1917,[26] it was not until 1951 that Illinois considered it as a possible cause of action within its borders.[27] Previously, claims for tortious interference were limited to interferences with business relations.[28] Nevertheless, while the court discussed it in 1951, it was not until 1981 that Illinois formally accepted tortious interference with an expectancy as a cause of action.[29] "The rationale, when expressed, for allowing such an action has either been that no policy reason exists not to extend protection to an expectancy in a noncommercial context, or that it is a principle of justice that no wrong is without a remedy."[30]

As established in *Nemeth v. Banhalmi*, a plaintiff filing a tort claim for intentional interference with an expectancy has the burden of proving five elements: (1) the existence of an expectancy; (2) the defendant's intentional interference with that expectancy; (3) tortious conduct, such as fraud, duress, or undue influence; (4) a reasonable certainty that the expectancy would have been realized but for the interference; and (5) damages.[31]

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20. 755 ILL. COMP. STAT. § 5/8-1 (1995).
21. *In re* Estate of Ellis, 923 N.E.2d 237, 240 (Ill. 2009) (citing Ruffing v. Glissendorf, 243 N.E.2d 236, 240 (Ill. 1968) (interpreting section 90 of the Probate Act, a predecessor of section 8-1)).
22. Pedersen v. Dempsey, 93 N.E.2d 85, 86 (Ill. App. Ct. 1950).
23. Robinson v. First State Bank of Monticello, 454 N.E.2d 288, 293 (Ill. 1983).
24. *Id.* at 294.
25. Nemeth v. Banhalmi, 425 N.E.2d 1187, 1190 (Ill. App. Ct. 1981).
26. *See* M.B., *supra* note 2.
27. Lowe Found. v. N. Trust Co., 96 N.E.2d 831, 834-35 (Ill. App. Ct. 1951).
28. The right to pursue one's business, calling, trade, or occupation is recognized as a property right which the law protects against wrongful interference. Doremus v. Hennessy, 52 N.E. 924, 926 (Ill. 1898); City of Rock Falls v. Chi. Title & Trust Co., 300 N.E.2d 331, 333 (Ill. App. Ct. 1973).
29. *Nemeth*, 425 N.E.2d at 1191.
30. *Id.* at 1190.
31. *Id.* at 1191.

B. The Development of the Cause of Action over Time

Following the establishment of tortious interference with an expectancy as a cause of action in Illinois, the status of the tort has evolved slowly. In *Robinson v. First State Bank of Monticello*, the court was first presented with the issue of whether individuals who had the opportunity to bring a claim against tortfeasors, but failed to do so within the six-month statutory period, were barred from recovery.[32] In *Robinson*, after the petitioner failed to file a tort action within the statutory period that governs the filing of a will contest, the court denied the petitioner's tort action.[33] Therefore, if one has the opportunity to file a will contest within the statutory period, a failure to do so will bar future recovery and a claim for tortious interference with an expectancy will not lie.[34] The court reasoned that to allow such a claim to go forward would, in practical effect, invalidate the stability and purpose of the Probate Act.[35]

Shortly thereafter, in *In re Estate of Hoover*, the court reiterated the holding of *Robinson* and shed light on what constitutes inadequacy.[36] In *Hoover*, the court adopted Florida's approach to what constitutes inadequate relief.[37] "Adequacy is predicated on what the probate court can give as compared to what the plaintiff reasonably expected from the testator prior to interference."[38] Accordingly, *Hoover* established that an award of punitive damages was not considered a valid expectation because the plaintiff could not have reasonably expected to recover such damages prior to the unforeseen act.[39]

During the same year, the court addressed the issue of whether a tort claim may be heard at the same time as a will contest.[40] In *Estate of Jeziorski*, the court answered this question in the affirmative.[41] A tort claim may be heard at the same time as a will contest, so long as the will contest does not provide an adequate remedy.[42] "Probate controversies do not

32. 454 N.E.2d 288, 292 (Ill. 1983).
33. The decedent's heirs hired an attorney to determine whether to file a tort claim and decided not to, entered into settlement agreement for $125,000, agreed not to file any other claims, and voluntarily allowed statutory period to expire. *Id.* at 293.
34. *Id.*
35. *Id.* at 294.
36. *See In re* Estate of Hoover, 513 N.E.2d 991, 992 (Ill. App. Ct. 1987).
37. *Id.*
38. DeWitt v. Duce, 408 So.2d 216, 220 n.11 (Fla. 1981).
39. *Hoover*, 513 N.E.2d at 992.
40. *See* Estate of Jeziorski, 516 N.E.2d 422, 424 (Ill. App. Ct. 1987).
41. *Id.* at 426-27.
42. Although Illinois seems to unmistakably hold that where a will contest is available and would provide adequate relief to an injured party, a tort action for intentional interference with expectancy under a will does not lie, at least one case has failed to follow precedent. *See* Prosen v. Chowaniec, 646 N.E.2d 1311, 1312-13 (Ill. App. Ct. 1995).

expressly preempt any tort remedies plaintiffs may have."[43] However, where a will contest is available and would provide adequate relief to an injured party, a tort action for intentional interference with an expectancy under a will does not lie.[44] Therefore, leading up to *Ellis*, courts have consistently taken steps to ensure the preservation of the broad remedial nature of the cause of action and formed two prerequisites to bring a tort claim in Illinois: (1) all remedies via will contest must be exhausted;[45] and (2) a will contest must be unable to provide the injured party with adequate relief.[46]

III. EXPOSITION OF *IN RE ESTATE OF ELLIS*

The issue presented in *Ellis* was whether the six-month statute of limitations for a will contest also applies to claims for tortious interference with an expectancy, so as to bar recovery to all individuals who fail to take action within this period, including individuals who fail to discover the tortious act within this period.[47] The Supreme Court of Illinois concluded that the six-month statute of limitations to file a will contest did not apply to an intentional interference with an expectancy claim in which the victim did not have a fair opportunity to pursue a remedy in probate court.[48] In *Ellis*, the victims were not aware of the tortious conduct until after the six-month statute of limitations had passed, and the will contest would not have provided sufficient relief in that it would not have extended to alleged inter vivos transfers of property.[49] The court distinguished *Ellis* from *Robinson* in that Shriners Hospitals for Children (Shriners), the plaintiff in *Ellis*, did not forgo an opportunity to contest the will.[50] In *Ellis*, the plaintiff never had such an opportunity because it did not know of the tortious act until after the statute of limitations had passed.[51]

A. Statement of Facts

Grace Ellis, of Skokie, Illinois, was an only child.[52] She neither married nor had children.[53] In December of 1964, Ellis initially executed a

43. *Jeziorski*, 516 N.E.2d at 426.
44. *In re* Estate of Knowlson, 562 N.E.2d 277, 280 (Ill. App. Ct. 1990); *Jeziorski*, 516 N.E.2d at 426-27; *In re* Estate of Hoover, 513 N.E.2d 991, 992 (Ill. App. Ct. 1987).
45. *Knowlson*, 562 N.E.2d at 280; *Hoover*, 513 N.E.2d at 992.
46. Robinson v. First State Bank of Monticello, 454 N.E.2d 288, 294 (Ill. 1983); *Jeziorski*, 515 N.E.2d at 427.
47. *In re* Estate of Ellis, 923 N.E.2d 237, 240 (Ill. 2009).
48. *Id.*
49. *Id.*
50. *Id.* at 242.
51. *Id.*
52. *In re* Estate of Ellis, 887 N.E.2d 467, 468 (Ill. App. Ct. 2008), *rev'd*, 923 N.E.2d 237 (Ill. 2009).

will naming her elderly parents as primary beneficiaries and Shriners as contingent beneficiary.[54] On August 9, 1999, Ellis executed a subsequent will naming James G. Bauman, the pastor of her church, as sole beneficiary of her estate and Ellis' surviving heirs as contingent beneficiaries.[55] She also named Bauman as her agent under powers of attorney for both health care and property.[56] Furthermore, Ellis transferred the title of her vehicle and more than $1 million of her assets to Bauman.[57]

On October 8, 2003, Ellis died at the age of eighty-six leaving no direct descendants and a multi-million dollar estate.[58] The 1999 will was admitted to probate on October 29, 2003, and Bauman was named independent executor of her estate.[59] It was not until 2006 that Shriners became aware of its interest in the 1964 will, which arose as part of a separate will contest brought by several of Ellis' heirs at law.[60] Accordingly, Shriners filed an action to contest the 1999 will.[61]

B. Procedural History

Shriners' three-count petition to contest the will alleged theories of undue influence, fraud, and tortious interference with an expectancy.[62] Bauman moved to dismiss the petition as being time-barred pursuant to the six-month limitation period of section 8-1 of the Probate Act of 1975.[63] The motion was granted with prejudice, and Shriners was denied leave to amend.[64] On appeal, Shriners challenged only the dismissal of the tort claim.[65] The appellate court affirmed the trial court's judgment, holding that Shriners' claim was virtually identical to the count filed based on undue influence under the will contest.[66] The appellate court held the legislature could not have reasonably intended to bar the will contest, while allowing substantially the same claim to go forward as a tort.[67] To do so, the court would be giving the plaintiff, Shriners, "a second bite of the apple

53. *Id.*
54. *Ellis*, 923 N.E.2d 237, 238 (Ill. 2009).
55. *Id.* at 239.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. 755 ILL. COMP. STAT. § 5/8-1 (1995).
64. *Ellis*, 923 N.E.2d at 239.
65. *Id.*
66. *Id.*
67. *Id.*

and defeating the purpose of the exclusivity of a will contest under section 8-1."[68]

C. Opinion of the Court

On appeal to the Illinois Supreme Court, the plaintiff argued the statute of limitations for a will contest was not applicable to a tort claim for intentional interference with an expectancy because doing so clearly contradicted the unambiguous language of the probate statute and confused the tort claim with a will contest.[69] The court explained that a will contest was distinct from a tort claim for intentional interference with an expectancy in many ways.[70] A will contest is considered a quasi in rem[71] proceeding in which the sole issue is whether the writing produced is the will of the testator and the object of the contest is to set aside the "disputed" will.[72] However, a tort claim seeks an in personam[73] judgment and the issue is whether the tortfeasor has intentionally interfered with the expectancy of the plaintiff.[74] Unlike a will contest, a tort claim is a personal action directed at an individual tortfeasor.[75] Although there is some overlap between the two, a tort claim has its own distinct elements and remedies.[76] Accordingly, the court established that a tort claim for intentional interference with an expectancy was separate and distinct from a will contest.

Ellis acknowledged that Illinois courts have restricted tort claims in certain situations where a plaintiff failed to file a claim within the six-month statutory period applicable to a will contest.[77] For example, in *Robinson*, while a will was admitted into probate, plaintiffs entered into a settlement agreement and agreed to release all parties from all claims in exchange for $125,000.[78] However, following the expiration of the six-month statute of limitations, the plaintiffs filed a claim for tortious interference with an expectancy.[79] In *Robinson*, the court refused to

68. *Id.* at 242 (citing Robinson v. First State Bank of Monticello, 454 N.E.2d 288, 294 (1983)).
69. *Id.* at 241.
70. *Id.* at 240.
71. Involving or determining the rights of a person having an interest in property located within the court's jurisdiction. BLACK'S LAW DICTIONARY 864 (9th ed. 2009).
72. *Ellis*, 923 N.E.2d at 240.
73. A court's power to bring a person into its adjudicative process; jurisdiction over a defendant's personal rights, rather than merely over property interests. BLACK'S LAW DICTIONARY 930 (9th ed. 2009).
74. *Ellis*, 923 N.E.2d at 240.
75. *Id.*
76. *Id.* at 241.
77. *Id.*
78. *Id.*
79. *Id.*

recognize the tort action because to do so would defy the purpose of the statute of limitations.[80] It would "give a second bite of the apple and defeat the purpose of exclusivity of a will contest."[81] *Ellis* emphasized, however, that this "'practical effect' of allowing the plaintiffs to maintain the tort action must be read in the context of the facts of that case."[82] Unlike *Robinson*, where the plaintiffs chose to forgo an opportunity to contest a will, the plaintiff in *Ellis* never had that opportunity.[83] Shriners had no available remedy because it was not aware of the tortious conduct until more than two years after the will was admitted to probate.[84] Accordingly, the court found the two cases distinguishable.[85]

Next, the court compared the facts of *Ellis* to a similar case from Florida, and after finding the case's holding persuasive, the court adopted its reasoning.[86] In *Schilling*, the court permitted plaintiffs to bring a claim for tortious interference with an expectancy where the defendant's fraudulent acts were not discovered until after the probate period had expired.[87] Relief in probate is impossible to those who are unaware of the tortious acts.[88] Like *Schilling*, Shriners never received a fair opportunity to pursue a will contest. During the six-month statute of limitations, Shriners was not aware of Mr. Bauman's tortious conduct or its expectancy under the earlier will.[89]

Finally, the court established that "a will contest would not have provided sufficient relief to Shriners because it would not have extended to alleged inter vivos[90] transfers of property."[91] Ellis' transfer of more than $1 million in assets to Bauman prior to her death was challenged by plaintiffs.[92] However, even if Shriners successfully contested the will, it would have been allowed to recover only those assets which were part of Ellis' estate at the time of her death, not assets transferred during her lifetime.[93] The court therefore found *Ellis* analogous to *Jeziorski*, where the

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80. The statute of limitations for a will contest assists "the pressing importance of securing an orderly settlement of estates, to prevent embarrassment to creditors and others, and to avoid as much confusion as possible in the vest [sic] amount of property rights and titles that pass through probate." Pendersen v. Dempsey, 93 N.E.2d 85, 86 (Ill. App. Ct. 1950).
81. *Ellis*, 923 N.E.2d at 242.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *See* Schilling v. Herrera, 952 So.2d 1231 (Fla. Dist. Ct. App. 2007).
87. *Id.* at 1236-37.
88. *See id.* at 1236
89. *Ellis*, 923 N.E.2d at 243.
90. Of or relating to property conveyed not by will or in contemplation of an imminent death, but during the conveyor's lifetime. BLACK'S LAW DICTIONARY 898 (9th ed. 2009).
91. *Ellis*, 923 N.E.2d at 243.
92. *Id.*
93. *Id.*

court held that a will contest alone could not fully compensate the plaintiffs following the defendant's fraudulent procurement of inter vivos transfers and substantial liquidation of the estate.[94] Accordingly, like *Jeziorski*, a will contest was inadequate and the claim could not be barred.[95]

In sum, the court held the statute of limitations for a will contest did not apply to the tort action filed by Shriners.[96] However, the court reiterated that its holding was specific to the facts of *Ellis*.[97] Therefore, the six-month statute of limitations to file a will contest did not apply for intentional interference with an expectancy when (1) the plaintiff was not aware of the claim during the statutory period and (2) a will contest would not have provided sufficient relief in that it would not have extended to alleged inter vivos transfers of property prior to the death of the decedent.[98]

IV. ANALYSIS

Although *Ellis* is one of the latest Illinois cases to extend the cause of action to better meet the broad remedial goals it was instituted to attain, it will not be the last.[99] The *Ellis* court merely adumbrated the changes to come. While *Ellis* reached the correct result in extending the cause of action to those to who were unable to discover the tortious acts within the statutory period for a will contest, the court's decision failed to establish a deterrent against future tortfeasors. Although the court missed its opportunity in *Ellis*, it may still establish that those who intentionally and tortiously interfere with an expectancy will face punitive damages in the future. To accomplish this feat, Illinois courts have but one reasonable alternative: make tortious interference with expectancies a separate cause of action, instead of a last recourse. This Section will discuss the strengths and weaknesses of the *Ellis* decision and the opportunity for future change.

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94. *Id*.
95. *Id*.
96. *Id*. at 240-43.
97. *Id*. at 243.
98. *Id*. at 240-43.
99. The Illinois Supreme Court recently addressed the issue of "availability" of a will contest where a plaintiff is unable to discover assets through a citation proceeding. In distinguishing its opinion from *Ellis*, the court established that the six-month statute of limitations for a will contest is inapplicable to a plaintiff who does not receive an opportunity to file a will contest because: (1) the plaintiff was unable to sufficiently discover assets, and therefore probate recovery was "merely speculative"; and (2) the plaintiff sought damages for the tortious interference of non-probate assets which were separate and apart from a will contest. *See* Bjork v. O'Meara, 2013 IL 114044.

A. The Current Context of the *Ellis* Court's Decision

Like *Ellis*, Illinois courts as a whole have consistently addressed claims of tortious interference with an expectancy in a way to effectuate the intended broad remedial goals created by the institution of the cause of action.[100] In *Ellis*, the Illinois Supreme Court held that the six-month statute of limitations did not apply to Shriners because it was unaware of the pastor's alleged fraudulent conduct until after the statute of limitations had expired, and a will contest would not have provided adequate relief in that it would not provide a sufficient remedy for alleged inter vivos transfers.[101] The result was correct because it followed the consistent traditional approach and furthered the remedial goal that "no wrong goes without a remedy." [102]

1. Strengths of the Ellis *Decision*

First, *Ellis* was consistent with the established six-month statute of limitations for a will contest. If a challenger of a will fails to file a will contest within the statutory period, the validity of the will remains established for all purposes.[103] The statutory period, due to the gravity of interests at stake, was created to make the administration of estates as orderly as possible and create stability in that administration.[104] Accordingly, *Ellis* allows the estates of individuals in which no will contests are filed to be timely closed. However, instead of allowing tortfeasors to get away with intentional inappropriate conduct that victims are unaware of during the statutory period, *Ellis* holds tortfeasors responsible through a permissible separate tort claim.

Ellis did not allow the "second bite" that *Robinson* was fearful of.[105] In *Robinson*, the plaintiff already had one opportunity, through a will contest, to obtain a remedy.[106] In *Ellis*, the plaintiff never had this opportunity, and consequently, the plaintiff was not interfering with the "exclusivity of a will contest under section 8-1."[107] Therefore, the holding in *Ellis* respected the gravity of interests involved within the probate process and preserved the stability of the administration of estates.

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100. *See Ellis*, 923 N.E.2d at; Estate of Jeziorski, 516 N.E.2d 422, 425-26 (Ill. App. Ct. 1987); Nemeth v. Banhalmi, 425 N.E.2d 1187, 1190-91 (Ill. App. Ct. 1981).
101. *Ellis*, 923 N.E.2d at 240-43.
102. *Nemeth*, 425 N.E.2d at 1190.
103. *Ellis*, 923 N.E.2d at 240.
104. Pedersen v. Dempsey, 93 N.E.2d 85, 86 (Ill. App. Ct. 1950).
105. Robinson v. First State Bank of Monticello, 454 N.E.2d 288, 294 (Ill. 1983).
106. *Id.* at 293.
107. *Id.* at 294.

Second, *Ellis* was consistent with the broad remedial goals which the cause of action was instituted to attain.[108] When adopted, the court held "that no policy reason exist[ed] not to extend protection to an expectancy" and that "it [was] a principle of justice that no wrong [was] without a remedy."[109] *Ellis* was a mere extension of this policy. Prior to *Ellis*, if tortfeasors were able to conceal their tortious conduct from victims, via affirmative or non-affirmative action, victims were left with no remedy. However, this was not consistent with the underlying policy. Accordingly, *Ellis* established that no reason existed to deny protection to those, like Shriners, who never received a fair opportunity to seek corrective action during the statutory period for a will contest.[110] As a result, tortious acts will not lie in Illinois without a remedy. Therefore, *Ellis*' broad approach to ensure victims were given an opportunity for justice was consistent with the underlying policy the action was instituted to attain.

2. Weaknesses of the Ellis *Decision*

Although the court in *Ellis* reached the correct result, the limited ruling does have its disadvantages. More specifically, the court's decision fails to deter future tortfeasors and to provide a thorough approach to what constitutes complete recovery, which may lead to an additional burden on the judicial system.

a. Failure To Establish Deterrence

First, the decision rendered in *Ellis* failed to ensure the establishment of a deterrent. To adequately deter future tortfeasors, Illinois needs to allow plaintiffs to seek punitive damages. However, punitive damages are not recoverable in a will contest. In order to obtain punitive damages, plaintiffs must bring a tort claim. Before bringing a tort claim, plaintiffs must establish two prerequisites: (1) all remedies via will contest have been exhausted; and (2) a will contest must be unable to provide the injured party with adequate relief.[111]

Although *Ellis* took a step in the right direction by allowing Shriners to file a tort claim, the court failed to seize the opportunity it was presented with and apply a broader standard to deter future tortfeasors. To accomplish this task, the court had one reasonable alternative: make tortious interference with inheritances a separate cause of action, not a last recourse. Although the court could have instituted a claim for tortious

108. *See* Nemeth v. Banhalmi, 425 N.E.2d 1187, 1190 (Ill. App. Ct. 1981).
109. *Id.*
110. *In re* Estate of Ellis, 923 N.E.2d 237, 240-43 (Ill. 2009).
111. *Id.*

interference with an expectancy as a separate cause of action, the court failed to do so. As a result, the court failed to establish punitive damages as a deterrent against future tortfeasors.

b. Failure To Provide Complete Recovery

The decision rendered in *Ellis* also failed to provide a thorough approach to what constituted complete recovery, so as to institute a more appropriate standard to establish inadequate relief. In Illinois, "[a]dequacy is predicated on what the probate court can give as compared to what the plaintiff reasonably expected from the testator prior to interference."[112] Therefore, anything plaintiffs are unable to reasonably expect prior to the intentional tortious interference, such as recovery of punitive damages, is insufficient to establish inadequacy.

However, before the occurrence of tortfeasors' intentional acts, plaintiffs reasonably expect the present value of their assets at the end of the probate process, they do not reasonably expect the value of their expected estate to be reduced by attorney's fees, and they reasonably expect the timely opportunity to use their assets in any way they choose. The probate process does not allow recovery for any of these losses.[113] As a result, victims of a claim for tortious interference with an expectancy of inheritance are not able to recover an "adequate" remedy through the probate process. Therefore, the second prerequisite to file a tortious interference claim is always met, and a claim for such should be established as a separate cause of action.

In *Ellis*, Shriners was deprived of this opportunity and the present value of their assets when the defendant tortiously interfered with their expectancy. Due to the concealment of the tortious act, Shriners was deprived of its multi-million dollar expectancy for more than three years. Considering the value of the lost inter vivos gifts alone, Shriners lost about $90,000 over the course of three years.[114] As a result of inflation, likely inadequate conservative returns during the probate process, and the lost opportunity to use the expectancy during this time, Shriners was deprived of the present value of their funds. Furthermore, attorney's fees to remedy the tortious act created an additional cost to Shriners. A will contest is unable to provide plaintiffs with pre-judgment interest or attorney's fees.[115]

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112. DeWitt v. Duce, 408 So.2d 216, 220 n.11 (Fla. 1981).

113. Diane J. Klein, *The Disappointed Heir's Revenge, Southern Style: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Fifth and Eleventh Circuits*, 55 BAYLOR L. REV. 79, 88-89 (2003).

114. Assuming an inflation rate of three percent and compounding by simple interest, as opposed to compound interest.

115. *See* Klein, *supra* note 113, at 88-89.

Therefore, a will contest was unable to provide an adequate recovery to Shriners for several reasons.

Consequently, the *Ellis* court should have established that the inadequacy of a will contest was not limited to situations where there were alleged inter vivos gifts, but that there was a broad range of factors that could establish inadequacy. As a result, sufficient proof exists to establish that a will contest is never able to provide adequate relief, and therefore, the second prerequisite to bring a claim for tortious interference with an expectancy dissolves itself.[116] Thus, the filing of a tort claim should be permitted as a separate cause of action, and the courts' failure to do so has delayed the establishment of a deterrent against future acts of tortious interference with an expectancy.

c. Additional Burden on the Courts

Third, the application of the exception to the statute of limitations may lead to an additional burden on the judicial system. By allowing individuals to bring a cause of action long after the initial statute of limitations applicable to a will contest has passed, it may cause an additional burden on the courts. Although situations in which the specific facts of *Ellis* occur are rare, Illinois courts are already faced with a large yearly caseload.[117] Therefore, any amount of additional cases may cause a disproportionate effect on the judicial system. Furthermore, a larger caseload could cause an additional financial burden on the courts. However, when considering the bigger picture, the overall cost to the judicial system appears negligible in comparison to the added advantages. Accordingly, it appears self-evident that any additional costs, either administratively or financially associated with the implication of the new rule, are more than worth it.

B. The Future Context of *Ellis*

In *Ellis*, the court was provided with an opportunity to establish that all individuals who tortiously interfere with the expectancy of others will face punitive damages. Although the court did not directly bring up the issue of punitive damages, the court's failure to establish tortious interference with an expectancy as a separate cause of action, as opposed to

116. A will contest must be unable to provide the injured party with adequate relief. Estate of Jeziorski, 516 N.E.2d 422, 427 (Ill. App. Ct. 1987).

117. Illinois was faced with an additional 642,701 total incoming civil cases in 2008 alone. R. LAFOUNTAIN ET AL., EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 25 (2010), *available at* http://www.courtstatistics.org/Other-Pages/~/media/Microsites/Files/CSP/EWSC-2008-Online.ashx.

a last recourse, inadvertently preserved this problem. As a result, Illinois has continued to provide individuals with the opportunity to inappropriately and tortiously interfere with the expectancy of others with little to no risk. Although this scenario is the current status quo, Illinois is left with the opportunity for future change. To accomplish this act, the state has one reasonable alternative: make tortious interference with an expectancy a separate cause of action, not a last recourse. By taking this approach, Illinois would establish a deterrent against future tortfeasors, and the broad remedial nature of the action would be better satisfied.

1. The Establishment of a Separate Cause of Action

Illinois could establish tortious interference with expectancies as a separate cause of action. Instead of allowing the claim as a separate cause of action, Illinois currently treats the claim as a last recourse, allowing action upon the exhaustion of all other means of redress.[118] Before bringing an action in Illinois, two prerequisites must be met: (1) all remedies via will contest must be exhausted; and (2) a will contest must be unable to provide the injured party with adequate relief.[119] This approach does little to provide proactive protection to future victims. Therefore, to establish punitive damages, the court should allow the claim as a separate cause of action. However, to protect the probate process, the state should continue to require plaintiffs to file a claim within the six-month statute of limitations applicable to a will contest. In essence, by eliminating the need to establish a will contest as unable to provide the injured party with adequate relief, because a will contest is never able to provide plaintiffs with complete recovery or "adequate" relief, Illinois would provide needed deterrence against future tortfeasors and continue the preservation of the probate process.

As a result of continuing the application of the six-month statute of limitations, the purpose for which the current two prerequisites were created to attain is preserved. Individuals with an opportunity to file a claim do not obtain a "second bite of the apple" because they must file the tort claim at the same time as a will contest or not at all. Furthermore, the probate process would not be disturbed. The six-month statute of limitations for a will contest was instituted to create stability in the administration of estates, and to make the administration of estates as orderly as possible because of the gravity of interests involved.[120] Where a decedent's will is not contested within this statutory period, the validity of

118. *In re* Estate of Hoover, 513 N.E.2d 991, 992 (Ill. App. Ct. 1987).
119. *Id.*
120. Robinson v. First State Bank of Monticello, 454 N.E.2d 288, 294 (Ill. 1983).

the will is established for all purposes.[121] By eliminating the second prerequisite, the stability produced through the timely closure of estates could continue. Therefore, a tort claim could be filed along with a will contest during the six-month statute of limitations while preserving the probate process, and Illinois would finally establish a deterrent against future tortious acts.

By taking this approach, a claim for tortious interference with an expectancy would not constitute a collateral attack on the decree of the probate court.[122] It is proposed that claims must be brought at the same time. A claim for tortious interference with an expectancy and a will contest are not the same claim or cause of action within the meaning of claim preclusion.[123] A will contest, as a quasi in rem proceeding, is an attempt to attack the validity of a will and attempts recovery from an estate.[124] However, a tort claim, as an in personam judgment, is brought against a tortfeasor for the intentional interference with their expectancy in an attempt to recover compensation for a lost legacy.[125] The two are distinct claims[126] and allow distinct recovery and therefore could be allowed to be brought together, as separate actions, during the statutory period. The will contest would allow an attack on the validity of the will and recovery from the estate, and the tort claim would allow recovery of compensation for the lost value of their legacy during the probate process.

The fourth element of a claim for tortious interference with an expectancy is "a reasonable certainty" that the expectancy would have been realized but for the interference.[127] Therefore, to allow a tort claim to go forward at the same time as a will contest and preserve the tort claim from dismissal upon the success of a will contest, a plaintiff must establish that their expectancy is not realized by the success of a will contest.

However, Illinois courts could take a broad approach to obtain the desired deterrence. Expectancy is defined as the state of expecting.[128] Future beneficiaries are in the state of expecting assets at a "specific time," after the timely closing of probate. Illinois could establish that when an expectancy would have been realized after the timely closing of probate, but was deprived from the plaintiff at that time, their "true expectancy" is lost. Their "true expectancy" in assets not reduced by the time value of money does not include a reduction in value by additional attorney's fees,

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121. *Id.* at 293.
122. *See* Marmai, *supra* note 4, at 313.
123. *Id.*
124. *Id.*
125. *Id.*
126. *See* Barone v. Barone, 294 S.E.2d 260, 262 (W. Va. 1982); Frohwein v. Haesemeyer, 264 N.W.2d 792, 795 (Iowa 1978); Dulin v. Bailey, 90 S.E. 689, 689 (N.C. 1916).
127. Nemeth v. Banhalmi, 425 N.E.2d 1187, 1191 (Ill. App. Ct. 1981).
128. EUGENE EHRLICH ET AL., OXFORD AMERICAN DICTIONARY 302 (Heald Colleges ed., 1986).

but does include an opportunity to use their expected assets at the timely closing of probate. As a result of the delay's destruction of their "true expectancy," a claim is actionable. Whether plaintiffs later receive assets to which they were entitled is irrelevant because their "true expectancy" is not recoverable through a will contest, but is instead forever lost. Therefore, although some jurisdictions limit an action for tortious interference with an expectancy as a last recourse, Illinois should take a different approach and establish the claim as a separate cause of action. As a result, Illinois could deter future tortfeasors.[129]

2. A More Thorough Approach to What Constitutes Complete Recovery

Taking a more thorough approach to what constitutes complete recovery illuminates that a will contest is never sufficient to provide adequate relief to tort victims. A reasonable way to create a deterrent against future tortfeasors, however, is to establish tortious interference with an expectancy as a separate cause of action, not a last recourse. Before bringing an action in Illinois, a will contest must be unable to provide the injured party with adequate relief.[130] Illinois has adopted Florida's approach to what constitutes inadequate relief.[131] "Adequacy is predicated on what the probate court can give as compared to what the plaintiff reasonably expected from the testator prior to interference."[132] Accordingly, it is important to determine what plaintiffs reasonably expect from the testator prior to interference.

However, before looking to what is reasonably expected by plaintiffs, the historical context of the claim should be observed. A claim for tortious interference can be traced back to contract law.[133] Therefore, contract damages for lost expectations should be examined. "Damages based on expectation should . . . take into account any circumstances peculiar to the situation of the injured party, including that party's own needs and opportunities, personal values, and even idiosyncrasies."[134] Considering this broad subjective view and the expansive remedial nature of the underlying cause of action, reasonable expectations should be broadly

129. *See* Beth Bates Holliday, *Cause of Action for Interference With Expected Gift or Inheritance*, 36 CAUSES OF ACTION 2D 1, 33 (2008).
130. *In re* Estate of Hoover, 513 N.E.2d 991, 992 (Ill. App. Ct. 1987).
131. *Id.*
132. DeWitt v. Duce, 408 So.2d 216, 220 n.11 (Fla. 1981).
133. Long before Illinois recognized a cause of action for tortious interference with an expectancy, the state first recognized a cause of action for tortious interference with contractual relations. *See* Doremus v. Hennessy, 52 N.E. 924 (Ill. 1898). It was not until 1981 that a claim for tortious interference evolved from the context of contracts to that of an expectancy. Nemeth v. Banhalmi, 425 N.E.2d 1187, 1190 (Ill. App. Ct. 1981).
134. E. ALLEN FARNSWORTH, CONTRACTS 758 (Erwin Chemerinsky et al. eds., 4th ed. 2004).

interpreted. As a result of this broad interpretation, it is evident that the probate process provides plaintiffs with an insufficient net-present-value and inadequate compensation for attorney's fees and costs and is unable to compensate for lost opportunities.

a. Probate Provides Plaintiffs with an Insufficient Net Present Value

First, plaintiffs reasonably expect the present value of their assets or legacy at the end of the probate process. However, as in *Ellis*, plaintiffs are deprived of the expected present value of their assets when tortfeasors deprive them of their expectancy for an appreciable amount of time. Plaintiffs expect to have value *X* at the timely close of the probate process, but when individuals are forced to fight an extended probate battle to contest a will, the expected value of their assets or legacy is reduced. Accordingly, plaintiffs are left with *X* minus the reduction in value due to inflation. For example, had Shriners known of Bauman's tortious conduct, timely filed a claim, received their million dollar legacy six months later than expected due to an extended delay arising from the defendant's tortious conduct, and the conservative investment during the extended probate process returned a one percent annual return below the inflation rate,[135] it would have received a loss in net-present-value of about five thousand dollars. Therefore, plaintiffs are unable to recover what they reasonably expected from the testator prior to interference.

Historically, the inflation rate averages a little over three percent.[136] During the probate process, executors or administrators have large discretion in determining how to invest the assets of an estate.[137] Illinois does not impose, through case law or a statute, a duty to act as a prudent investor.[138] However, an executor may be held liable for any loss resulting from his or her negligent failure to dispose of speculative investments.[139] Accordingly, executors seek out conservative investments.

Due to the indefinite length of the probate process, the possibility to obtain an adequate return is further restricted. The longer an asset is invested, the higher the available rate of return. Whether the probate process will last six months or well over a year is uncertain. However, it is certain that investment in fixed securities for a fixed period of time carries a surrender fee for early termination of funds. Therefore, it is unlikely for an executor or administrator to tie up assets for an extended period of time.

135. As opposed to a possible two or two and a half percent return below the annual inflation rate.

136. The average annual inflation rate for the period since 1913 has been 3.24%. *Annual Inflation Rate Chart*, INFLATIONDATA.COM, http://inflationdata.com/inflation/Inflation/AnnualInflation.asp (last visited Nov. 5, 2011) (compilation of Bureau of Labor Statistics).

137. *See* 755 ILL. COMP. STAT. 5/21-1 (1995).

138. *In re* Estate of Pirie, 492 N.E.2d 884, 894-95 (Ill. App. Ct. 1986).

139. *See In re* Busby's Estate, 6 N.E.2d 451, 459 (Ill. App. Ct. 1937).

Short-term, conservative certificates of deposit and bank accounts currently yield less than one percent.[140] Consequently, to adequately diversify a portfolio in a reasonably safe environment and ensure the prevention of liability, executors may invest through the use of mutual funds for liquid assets.

However, as a result of the indefinite probate period, the freedom to invest in mutual funds is also limited. Investments may be limited by time constraints, transaction fees, restricted transaction dates limiting the period in which investors can buy or sell shares, overall liquidity, or various other restrictions imposed by mutual funds. Due to the indefinite period of the probate process, investment opportunities are limited. For a short indefinite period of time, investment in a mutual fund is not capable of reasonably obtaining a three percent annual return. Mutual funds have acquisition fees, management fees, and closing costs upon the sale of shares which compound to make a return equal to the inflation rate nearly impossible over a short period of time. Therefore, investment returns during the probate process are incapable of preserving the asset's underlying value. However, without restrictions associated with an indefinite period, a reasonably safe annual return equivalent to the inflation rate is readily available through investment in a diversified portfolio of multiple funds.[141]

In short, the unreasonable extension of the probate process resulting from intentional tortious acts reduces the expected underlying net-present-value of assets reasonably expected at the close of the probate process. Thus, plaintiffs are unable to recover what they reasonably expected from the testator prior to the interference. As a result, the probate process is inadequate, and a claim for tortious interference with an expectancy should be allowed to go forward.

b. Probate Provides Plaintiffs with Inadequate Compensation for Their Attorney's Fees and Costs

In addition to plaintiffs not being able to recover the present value of their expectancy without a tort claim, a will contest is also unable to

140. *Rates*, FIRST MID-ILLINOIS BANK AND TRUST, https://www.firstmid.com/index.cfm?pageID=158 (last visited Nov. 5, 2011).

141. A return equivalent, or slightly above the inflation rate may reasonably be attained though investment in a combination of various funds, including, but not limited to: large blend funds, such as PIMCO StocksPLUS Absolute Return D (PSTDX), which can offer available annual returns of 8.12%; emerging market bond funds, such as PIMCO Emerging Markets Bond (PEMDX), which can offer annual returns of 8.65%; multi-sector bond bunds, such as Loomis Sayes Bond (LSBRX), which can offer 7.68%; short government funds, such as American Century Zero Coupon 2015 Inv. (BTFTX), which can offer 4.8%. *See* http://finance.yahoo.com/ (follow "Get Quotes" hyperlink; then search "FFRHX"; then follow "performance" hyperlink; repeat for each fund) (last calculated Apr. 14, 2013) (research available for five-year annual returns through stock symbols).

provide sufficient recovery in other ways. A will contest does not compensate for the costs and attorney's fees resulting from the contest.[142] But for the tortious interference which caused the accumulation of attorney's fees and costs, the estate would have a greater value. As a result, successful will contestants are left with incomplete recovery.

Illinois has yet to speak on the matter of attorney's fees and costs.[143] However, other jurisdictions have accepted this approach. In *Peffer v. Bennett*, the Tenth Circuit allowed plaintiffs to pursue their claim for tortious interference to recover attorney's fees because the probate court could not provide adequate relief.[144] Likewise, in *King v. Acker*, the Texas Court of Appeals held that a plaintiff may pursue a tort claim if there have been extraordinary fees, such as an administrator's fees, in pursuing a will contest.[145] In *Huffey v. Lea*, the Iowa Supreme Court held, "We are strongly committed to the rule that attorney fees are proper consequential damages when a person, through the tort of another, was required to act in protection of his or her interest by bringing or defending an action against a third party."[146] Therefore, because other jurisdictions have accepted the recovery of attorney's fees and costs as sufficient to establish that a will contest is unable to provide an adequate recovery, so too should Illinois.

c. Probate Provides Plaintiffs with Inadequate Compensation for Lost Opportunities

Third, plaintiffs reasonably expect the opportunity to use their expected assets or legacy at the timely closing of the probate process. A will contest does not provide recovery for lost opportunity.[147] Accordingly, it does not have the ability to provide plaintiffs with adequate compensation. On the other hand, a tort claim may provide compensation for a lost opportunity.[148]

i. Tortious Interference with a Business Relationship Allows Recovery for Lost Opportunities

Although it seems clear that a will contest is never able to provide adequate relief due to the loss in present value of assets and additional

142. *See* Huffey v. Lea, 491 N.W.2d 518, 522 (Iowa 1992).
143. *See id.*
144. 523 F.2d 1323, 1323-24 (10th Cir. 1975).
145. 725 S.W.2d 750, 756 (Tex. Ct. App. 1987).
146. 491 N.W.2d at 522.
147. *See* 755 ILL. COMP. STAT. 5/8-1 (1995).
148. *See* Nemeth v. Banhalmi, 425 N.E.2d 1187, 1190 (Ill. App. Ct. 1981) (citing Doremus v. Hennessy, 52 N.E. 924 (Ill. 1898)) ("Interference with prospective economic advantage is a recognized cause of action in Illinois.").

attorney's fees, the probate process's inability to compensate for lost opportunities aids in establishing this fact. A claim for tortious interference with an expectancy is derived from an action for tortious interference with a business relationship or a prospective economic advantage.[149] Therefore, we should look to permitted recovery under a claim for tortious interference with a business relationship as guidance in determining what recovery should be permitted under a claim for tortious interference with an expectancy. Under a claim for interference with a business relationship or a prospective economic advantage, compensation for lost opportunities is permissible in many jurisdictions. In *Frank Coulson, Inc.-Buick v. General Motors Corp*., plaintiffs were allowed to seek recovery of lost expected profit from the sale of an automobile dealership.[150] Likewise, in *Landry v. Hornstein*, the seller of a pharmacy was allowed to bring an action for damages, including the lost proceeds from a negotiated sale.[151]

Similar to plaintiffs who are allowed to seek compensation for lost opportunity under a claim for tortious interference with a business relationship or economic loss, compensation for lost opportunities should be allowed under a claim for interference with an expectancy. As of November 2012, total U.S. consumer debt is estimated at almost $2.77 trillion.[152] Accordingly, almost all plaintiffs have some form of debt. If plaintiffs timely receive their expectancy, it can be established with reasonable certainty that they can and would pay off debt. As in *General Motors* and *Hornstein*, plaintiffs are seeking damages arising from a lost opportunity. Plaintiffs have a contract which could have been satisfied, thereby creating an economic advantage. Whereas the plaintiffs in *General Motors* and *Hornstein* could have received a lost "profit" arising from a sale, plaintiffs seeking money to which they are entitled under a will could receive a "profit" from the early payment of debt and a reduction in interest owed.

In addition to blocking an opportunity to pay off debt, defendants are also depriving plaintiffs of other opportunities. In *Cohen v. Battaglia*, trustees were not precluded from bringing a claim for tortious interference with a business relationship or a prospective economic advantage.[153] In *Battaglia*, the plaintiffs sought recovery for future economic benefit after alleging that they were required to pay substantial attorney's fees and that the sale price of assets was reduced due to the defendant's conduct.[154]

149. *Id.*
150. 488 F.2d 202, 202 (5th Cir. 1974).
151. 462 So.2d 844, 844 (Fla. Dist. Ct. App. 1985).
152. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, FEDERAL RESERVE STATISTICAL RELEASE: CONSUMER CREDIT (2013), *available at* http://www.federalreserve.gov/releases/g19/current/g19.pdf.
153. 202 P.3d 87, 94 (Kan. Ct. App. 2009).
154. *Id.*

Similar to *Battaglia*, substantial attorney's fees are incurred and asset value, as explained above, is reduced by the tortious interference with an expectancy. Furthermore, the opportunity to invest assets is lost. As a result, a plaintiff's economic benefit, the value of the estate, is reduced. Therefore, like *Battaglia*, plaintiffs should be allowed to file a tort claim because the probate process is unable to provide an adequate remedy.

ii. Tortious Interference with an Expectancy Allows Recovery for Lost Opportunities in Other Jurisdictions

By accepting this approach, Illinois would not be alone.[155] In *Huffey*, the plaintiff was allowed to bring a claim for tortious interference with an expectancy seeking, among other things, loss of farming time.[156] Allowing a claim for a lost opportunity, such as lost farming time, is substantially similar to allowing plaintiffs to bring a claim for the lost opportunity to pay off debt or invest. Both are lost opportunities which result in an economic loss to plaintiffs and both losses can be calculated with certainty. Therefore, other jurisdictions have established that plaintiffs may seek recovery for lost opportunities under a claim for tortious interference with an expectancy. Illinois has already accepted that tortious interference with a business relationship or economic advantage allows recovery for lost opportunities. Tortious interference with an expectancy is derived from a claim for tortious interference with a business relationship. Accordingly, it seems appropriate to establish that plaintiffs may recover for lost opportunities under a claim for tortious interference with an expectancy, which is not recoverable in a will contest, and by taking this approach Illinois would finally establish a basis for deterrence.

V. CONCLUSION

The Illinois Supreme Court established that the six-month statute of limitations for a will contest does not apply to the intentional interference of an expectancy where the plaintiff is not aware of the tortious conduct until after the statute of limitations has lapsed and a will contest would not have provided a sufficient remedy. By analyzing the question appropriately in light of the historical evolution of the doctrine and the broad remedial goals intended by the adoption of the cause of action in Illinois, the court correctly broadened the ability of individuals to bring forth a cause of action. However, in doing so, the court failed to establish a deterrent against future acts.

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155. Huffey v. Lea, 491 N.W.2d 518, 520 (Iowa 1992).
156. *Id.*

In *Ellis*, the court failed to establish that a claim for tortious interference with an expectancy will no longer be viewed as a last recourse, but rather as a separate cause of action. A historical interpretation of the doctrine, supplemented by the approach in other jurisdictions, suggests Illinois may still apply a more appropriate approach to what constitutes an adequate remedy.

As a means to accomplish this end, future courts may take a more in-depth analysis to net-present-value, attorney's fees and costs, or lost opportunities. As a result, it will establish that a will contest is never able to provide an adequate remedy for tort claims. Accordingly, a claim for tortious interference with an expectancy should be recognized as a separate cause of action and not a last recourse. However, to preserve the probate process, a six-month statute of limitations, congruent to the one applicable to the probate process, should be applied to tort claims. By accepting this approach and establishing that will contests are inadequate remedies against tort claims, Illinois could finally establish a deterrent against future tortious acts. Although the court missed its chance in *Ellis*, future plaintiffs still have the opportunity to seek out this change, and next time, the court may heed this call.