2010 WL 761895 (Mass.App.Ct.) (Appellate Brief)
Appeals Court of Massachusetts.

Phyllis A. COYNE, Plaintiff-Appellant,
v.
Elayne M. NASCIMENTO, Defendant-Appellee.

No. 2010-P-0012.
February 16, 2010.

Appeal from a Judgment and Order of the Middlesex Superior
Court Docket No. MICV2006-03696-J (Kottmyer, J.)

Plaintiff-Appellant's Brief

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***1 I. ISSUES: STATUTE OF LIMITATIONS**

A. Did the superior court err in concluding that the statute of limitations for a tortious interference with an expected inheritance claim does not toll but, instead, begins to run prior to the exhaustion of probate remedies?
B. In granting the defendant's cross-motion for summary judgment, did the superior court err in concluding that, as a matter of law, the plaintiff's probate complaint conclusively established:

1. That the plaintiff had “actual knowledge” that the defendant repudiated her trust? and

2. Therefore, by implication, that the plaintiff knew that the defendant had acted in an unlawful way and with intent to interfere with the plaintiff's inheritance? and

3. Consequently, that plaintiff claim accrued and the statutory clock on the plaintiff's tort began to run with the filing of her probate complaint?

***2** C. Given that there exists no controlling law, conflicting authorities, and a lack prejudice to the defendant, should the court equitably toll the statute of limitations in this case?

II. STATEMENT OF THE CASE

Currently there exists no controlling authority on whether the statute of limitations has expired on the plaintiff's claim for tortious interference with ah expected inheritance.

In order to answer whether the statute of limitations has expired, this court must first determine *when* the statutory clock begins to run. That answer, in turn, depends on how this court resolves the question of *what* facts trigger the statute when the claim involves a fiduciary's tortious abuse of trust.

In most instances, the questions of what and when will be non-issues if this court concludes that plaintiffs must first exhaust probate remedies before a tortious interference with inheritance claim accrues or, alternatively, that during the pendency of the probate proceedings the statute of limitations for the tort tolls.

***3** How this court treats this exhaustion requirement implicates the authority of the probate courts and the administration of estates.

The underlying dispute, between the appellant, Phyllis A. Coyne, and her older sister, the appellee, Elayne M. Nascimento, involves the estate of their late father, James A. Coyne. They are his only children and heirs. Mr. Coyne died of Alzheimer's disease on July 29, 2002. RA p. 72. A year prior to his death, under the guise of Medicaid/MassHealth long term care planning, Ms. Nascimento transferred or arranged for the transfer of nearly all of Mr. Coyne's assets, then valued in excess of $800K, to herself. RA p. 188-189.

Recently, the **financial exploitation** of the **elderly**, an age-old problem, has made tabloid headlines. [1] This case, though less sensational, reflects a modern twist in that timeless story of greed and familial discord. [2]

***4 III. FACTUAL AND PROCEDURAL BACKGROUND**

A. Factual Background

By March of 2000, Mr. Coyne could not, without prompting, remember the names of his two daughters. RA p. 210, TT 48. [3] By all accounts a very genial man, he suffered from progressive dementia. His physician, Dr. Legare, described him as "an old salt, an old salt." Dr. Legare first diagnosed Mr. Coyne with "probable Alzheimer's type dementia" in 1996 and, at that time, recommended that Mrs. Coyne begin handling her husband's **finances**. RA p. 246, TT 151.

Through hard work and savings, Jim and Peggy Coyne purchased a multi-family home in Watertown, where their ***5** daughters grew up, and by the end of their lives they held, in addition to the house, an asset portfolio valued in excess of $400K. RA p. 188.

The Coynes did not favor one daughter above the other; they were loving and generous parents. RA p. 205, TT 64. In 1989, the Coynes asked their 1st floor tenant to move so that Ms. Nascimento, who recently divorced, and her teenage daughters could return home. RA p. 260, TT 2-29. In 1991 Ms. Nascimento was diagnosed with breast cancer. She paid her parents below-market rent, even after receiving in the late 1990s a settlement from a million-dollar, med-mal lawsuit she filed against her HMO. RA p. 275, TT 2-90.

Ms. Coyne, who moved to Oregon in the last 1970's, worked as a teacher and special education and autism consultant. She routinely vacationed with her parents and returned to Massachusetts during school breaks to visit with them. RA p. 195, TT 22-24.

The sisters did not enjoy a close relationship - what little relationship they had all but fractured in late 1999 when Ms. Nascimento placed Mrs. Coyne in an assisted living facility over Mrs. Coyne's objections and without consulting her sister, Ms. Coyne. RA p. 196, TT 30. (In 1999, Mrs. Coyne's health began to deteriorate.) RA p. 279, TT 2-105.

***6** While Mr. and Mrs. Coyne shared a common love for their daughters their relationship with each other was fraught. RA p. 255, TT 2-12. Of her parents, Ms. Nascimento seemed to favor Mr. Coyne; recounting that her parents had not helped her when she was ill, Ms. Nascimento said that during that time her mother "was making my life more difficult." RA p. 275, TT 2-92.

In November 1999, a month before placing Mrs. Coyne in an assisted living facility, Ms. Nascimento contacted Attorney Loughran. RA p. 269, TT 2-67. Attorney Loughran had taken over the practice of the Coynes' former lawyer, Attorney Corbin. Although he later found Mrs. Coyne's 1993 Will, Attorney Loughran could not find the firm's copies of the Coyne's powers of attorney also executed in 1993. RA p. 227, TT 77.

Attorney Loughran prepared new powers of attorney naming Ms. Nascimento as Mr. and Mrs. Coyne's attorney-in-fact. RA p. 175. With these instruments, Ms. Nascimento gained full control over her parents' assets. She later inquired of Attorney Loughran about strategies for shielding her parents' assets given the cost of Mrs. Coyne's institutional care and the probable need for nursing home care for Mr. Coyne. RA p. 185. Attorney Loughran referred her to Attorney Amaru, who specialized

in ***7** MassHealth/Medicaid planning. RA p. 229, TT 82. Medicaid/MassHealth plans typically recommend transferring the **elder's** assets to protect the funds from the high cost of long-term care and preserve a modest sum for the spouse remaining in the community. RA p. 230, TT 88.

In February of 2001, Ms. Nascimento met with Attorney Amaru, who advised her to consolidate her parent's assets in anticipation of making disqualifying transfers. RA p. 231, TT 90-91.

Mrs. Coyne died May 29, 2001. RA p. 232, TT 94. Less than two months after Mrs. Coyne's death Ms. Nascimento had transferred or arranged for the transfer of the family home and nearly all of her parent's assets to herself. Ms. Nascimento claims the asset transfers were advised by Attorney Loughran and/or Amaru and ratified by Mr. Coyne as her reward for caring for him. RA p. 271-272, TT 2-73 through 2-77. Attorney Amaru provides an alternative interpretation of events -- *one* that reflects Ms. Nascimento's talent for manipulation, calculation, and deceit. RA p. 19 and 232-233, TT 95-98.

Attorney Amaru predicated his advice on Ms. Nascimento's representations that the asset transfers, made in anticipation of Mr. Coyne's need for long-term care, would be held for his benefit and then, after his death, ***8** shared equally between her and younger sister. RA p. 232, TT 95. Attorney Amaru relied on Ms. Nascimento for information about her father's assets and took her at her word regarding how those assets would be distributed after his death. RA p. 232-233, TT 97, 101. Attorney Amaru never consulted with Mr., Mrs., or Ms. Coyne. Mr. Coyne, whom he never met, was incapable of managing his own affairs. RA p. 230, TT 89.

Attorney Amaru, who notarized the deed reserving a life estate for Mr. Coyne and transferring the remainder interest in the home to Ms. Nascimento, advised Ms. Nascimento that while valid for purposes of MassHealth regulations, he had doubts that the deed would survive a legal challenge since Mr. Coyne's power of attorney did not authorize large gifts or transfers for nominal consideration. RA p. 232, TT 96; and RA p. 175.

Unlike the transfer of the deed, Attorney Amaru was not actively involved in the transfer of the securities, which had a value in July of 2001 of more than $250K. In transferring these assets, Ms. Nascimento did not use Mr. Coyne's power attorney, instead, she took Mr. Coyne to the local bank where he signed the documents necessary to transfer the funds to an account in her name only. RA p. 276, TT 2-94."

***9** Ms. Nascimento did not tell her sister about any of the asset transfers. RA p. 257, TT 2-18.

After Mr. Coyne's death in July of 2002, Attorney Loughran handled Mr. Coyne's probate estate and in November met with both Ms. Nascimento and Ms. Coyne. At that meeting, Ms. Nascimento provided a listing of Mr. Coyne's assets. RA p. 188. The house was not listed. That transfer was allegedly made pursuant Medicaid/ MassHealth planning. RA p. 256, TT 2-16. The assets listed in Ms. Nascimento's name only were allegedly held that way for purposes of convenience. RA p. 205, TT 61. Attorney Loughran substantiated the legitimacy of Ms. Nascimento's actions. RA p. 229, TT 83-83.

Ms. Coyne only had access to information about Mr. Coyne's estate through Ms. Nascimento and/or Attorney Loughran. Her search of the registry records in December 2002 also seemed to corroborate her sister's representations that the transfers were made on advice of counsel, as Attorney Amaru notarized the deed transferring the real property. RA p. 172.

Attorney Loughran, who represented Ms. Nascimento in her capacity as executrix for the estate and also in her individual capacity, attempted to settle the estate, initially offering Ms. Coyne a one-half share in the ***10** securities and $125K for her share of the real property, which by then had a value then of $600-650K+/-. RA p. 166. Ms. Coyne declined to accept that offer. RA p. 121. Subsequent efforts at settlement were equally unsuccessful. Settlement discussions reflect that Ms. Coyne still believed that Ms. Nascimento transferred her father's assets at the direction and on the advice of counsel. RA p. 121-128, 166.

On July 25, 2003 Ms. Nascimento filed a claim in superior court asserting that she was entitled to more than $350K from the estate for the services and companionship she provided Mr. Coyne. See, *Nascimento v. Nascimento*, Superior Court at Middlesex, Docket No. MICV2003-03091, dismissed on jurisdictional grounds, (Borenstein, J.). [4]

On August 5, 2003, Ms. Coyne filed an equity suit in the probate court seeking, inter *alia*, an accounting of Mr. Coyne's assets and alleging, based on information and belief, that Ms. Nascimento breached her fiduciary duty to Mr. Coyne and his beneficiaries. She did not allege tortious abuse of duty or bad faith. RA p. 97.

***11** In August of 2003, Ms. Coyne knew that her father's last known intent was that his estate be shared equally between her and her sister; that her sister had transferred the assets, allegedly on the advice of counsel; and that Ms. Nascimento refused to restore them to his estate.

Facts about Ms. Nascimento's scheme interfere with Ms. Coyne's expected inheritance would only emerged through discovery conducted in the underlying probate matter.

Attorneys Loughran and Amaru only spoke and shared information with Ms. Coyne when compelled by subpoena. Even then, Ms. Coyne's efforts to gain a full understanding of what transpired were frustrated. Ms. Nascimento refused to waive attorney-client privilege for any matters related to her conduct after Mr. Coyne's death. RA p. 16, DT 31.

Attorney Loughran proved to be an unsatisfactory witness of events, lacking any meaningful recall. RA p. 17, DT 34-35. His records, obtained in December 2003, did, however, provide helpful information. RA p. 185.

It was only after deposing Attorney Amaru, in February of 2004, that Ms. Coyne learned of her sister's duplicity. Only then did she have factual basis to conclude that Ms. Nascimento lied -- not only to her but also to Attorneys Loughran and Amaru. Ms. Nascimento manipulated their counsel. Her management of her father's estate was not, in ***12** fact, consistent with their advice. RA p. 19-20, DT 38-45; RA p. 232, TT 95.

While Ms. Nascimento continues to deny any wrongdoing, RA p. 154, Attorney Amaru's testimony speaks to her bad faith and her abuse of his counsel. Ms. Nascimento used Attorneys Loughran and Amaru's legal advice about estate and Medicaid/ MassHealth planning to frustrate Mr. Coyne's known wish that his estate be shared equally between her and her younger sister. RA p. 50.

Knowing that the transfer of the house would not likely survive a legal challenge, Ms. Nascimento did not to transfer the securities using Mr. Coyne's power of attorney. Instead she took her 90-year old father, who like a well-versed 4-year old could follow a 3-step command, RA p. 58, RA p. 251, TT 172, to a bank to sign the forms necessary to transfer the more than a quarter-million dollars held in securities to an account in her name. RA p. 276, TT 2-942-96. When asked in January 2004 about the transaction, Ms. Nascimento feigned innocence, blaming Attorney Amaru. RA p. 21, DT 162; see also RA p. 259, TT 2-28; RA p. 276, TT 2-96.

Ms. Coyne, who had a lifetime of experience with her older sister, did not trust her and suspected “something was afoot.” RA p. 218, TT 41 and RA p. 224, TT 62.

***13** But Ms. Coyne only learned of her sister's deceit after Attorney Amaru's deposition. RA p. 19.

Attorney Amaru contradicted Ms. Nascimento's claims of good faith, which she had made just one month early, during her deposition and under oath, and again at trial. A comparison of their deposition and trial testimony confirms their conflicting accounts. The probate court found Attorney Amaru's testimony credible and, further, that Ms. Nascimento did not act in good faith. RA p. 59-60.

***14 B. Procedural Background**

On October 16, 2006, Ms. Coyne filed in Superior Court an action against her sister for tortious interference with her expected inheritance. RA p. 145. Ms. Nascimento filed an Answer and denied any wrongdoing. RA p. 154.

A few weeks earlier, on September 22, 2006, the probate court -- after a bench trial [5] and protracted post-trial proceedings -- ruled that Ms. Nascimento had "breached her fiduciary duty to act fairly and in good faith." The probate court reiterated that finding in its amended judgment on October 19, 2006. RA p. 53.

Ms. Nascimento appealed the Probate Court's ruling. The Appeals Court affirmed the probate court's findings. RA p. 85.

On August 8, 2008, Ms. Coyne filed a Motion for Partial Summary Judgment on the issue of Ms. Nascimento's liability for interfering with her expected inheritance. RA p. 43

On September 19, 2008, Ms. Nascimento filed an Opposition and Cross-Motion for Summary Judgment. RA p. 73

***15** On August 6, 2009, the court (Kottmyer, J.) granted Ms. Nascimento's Cross-Motion for Summary Judgment, concluding that Ms. Coyne's August 5, 2003 probate complaint established, a matter of law, that she had actual knowledge that Ms. Nascimento repudiated her trust and, therefore, that Ms. Coyne's tort action was barred as it was not commended within the statutory period directed by G.L. c. 206, §2A. Exhibit B and RA p. 32.

On August 18, 2009, Ms. Coyne filed a Motion for Reconsideration and to Amended Judgment. RA p. 6. Ms. Nascimento filed an Objection on September 11, 2009. RA p. 23. Ms. Coyne filed her Reply on September 18, 2009; RA p. 26; the court (Kottmyer, J.) denied Ms. Coyne's motion on September 25, 2009. Exhibit A and RA p. 5.

Ms. Coyne filed a notice of appeal on September 4, 2009; RA p. 29; and amended notice of Appeal on October 26, 2009. RA p. 3.

***16 IV. SUMMARY OF ARGUMENTS**

A. Exhaustion of Probate Remedies: Inherent in nearly all tortious interference with an expected inheritance claims are underlying probate matters. Massachusetts, like the majority of states that recognize the tort, does not do so until a donor has died. [6] *Labonte v. Giordano*, 426 Mass. 319 (1997); contra *Harmon v. Harmon*, 404 A2d 1020 (Me. 1979).

The court's determination of when the tort accrues and whether the statute of limitations tolls during the ***17** pendency of probate proceedings, necessarily implicates the authority of the probate court and the administration of estates. Requiring that disappointed heirs exhaust their probate remedies before pursuing an action in superior court recognizes the contingent nature of the tort and avoids a range of potential harms, including, among other ills: upsetting the statutory scheme designed by the legislature to ensure the stable, fair administration of estates; protecting creditors and other beneficiaries; preventing collateral attacks on probate decrees; avoiding premature or duplicative litigation; and/or conflicting judgments and double recovery.

Tolling the statute of limitations until the underlying probate matters have been litigated also supports the goals of judicial economy and efficiency. Facts in the underlying probate matter are often similar or may be identical to those that give rise to the tort and, so, resolution of the probate matters will typically resolve all but the question of damages in the subsequent tort claim. See *Hadayia v. Kayakachoian*, Superior Court of Massachusetts, at Norfolk, Docket No. 97-01110, 11 Mass. L. Rep. 29 (1999).

***18 B. Actual Knowledge:** To the extent that a tortious interference with an expected inheritance claim is predicated, in part, on the tortiously abusive actions of a fiduciary, that cause of action should accrue at the point when an aggrieved party has knowledge of facts sufficient to make a *prima facie* case. This showing requires allegations that support the requisite elements of the tort, including facts that go to the crux of the tort -- the defendant's intentional and unlawful conduct.

At a minimum, the statute of limitations should not commence until a plaintiff has knowledge that the defendant's conduct was abusive and not the product of a fiduciary's negligence, mistake, or good-faith reliance on counsel.

C. Equitable Tolling: When controlling law does not exist, persuasive authority conflicts, and no prejudice befalls a defendant, the statute of limitations should be tolled.

***19 V. STANDARD OF REVIEW**

"This court reviews a grant of summary judgment de novo, to determine whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law." *District Attorney for the Northern District v. School Committee of Wayland*, 455 Mass 561, 566 (2009)(Citations and quotation marks omitted.)

VI. DISCUSSION

A. Statute of Limitations, Torts

Ordinarily, actions of tort must commence within three years after the action accrues. Mass. G.L. c. 260, §2A. Although not defined by statute, courts have held that actions accrue at the time of injury; *Koe v. Mercer*, 450 Mass. 97, 101 (2007); however, there are a number of factors that may toll or delay the running of the statutory clock, including a plaintiff's lack of knowledge about an appreciable, cognizable harm.

Basic fairness dictates a flexible approach in the application of the statute; *Doe v. Harbor Schools, Inc.*, 446 Mass. 245, 254 (2006); and courts make determinations regarding factors that may toll the procedural rule. See, e.g., *Gates v. Reilly*, 453 Mass. 460 (2009).

A compliant alleging tortious interference with an expected inheritance must, at a minimum, allege facts ***20** sufficient to show that the plaintiff had a legally protected interest; that the defendant intentionally interfered with the plaintiff's expectancy in an unlawful way; and that interference operated continuously until the testator's death. *Labonte*, supra at 320-321.

Torts alleging breach of fiduciary duty require that the beneficiary had "actual knowledge" that the fiduciary repudiate her trust before the cause of action will accrue, constructive knowledge is not enough to trigger the statute of limitations. *O'Connor v. Redstone*, 452 Mass. 537, 552 (2008). This court has held that "repudiation does not occur if the trustee instead of flatly rejecting a demand or request gives some apparently good or plausible reason for noncompliance." *Lattuca v. Robsham*, 442 Mass. 205, 214 (2004). (Citations and quotation marks omitted.)

Application of respective statute of limitations usually involves a question of fact to be decided by the jury. See *Taygeta Corporation v. Varian Associates, Inc.*, 436 Mass. 217, 229 (2002).

In most cases, however, long before a claim alleging tortious interference with an expected inheritance reaches a jury, related matters should have already been litigated in probate court.

***21 B. Exhaustion of Probate Remedies**

Historically probate courts have jurisdiction over the administration of estates. See, e.g., G.L. c. 215, §3. Consequently, the majority of jurisdictions that recognize the need for the tort (because complete relief cannot be provided by probate or equity courts) require that an aggrieved party first exhaust the probate process before pursuing a tortious interference with an expected inheritance claim in the superior courts. The plaintiff must show that conventional probate or equity relief is inadequate or not available. Thus the tort serves as a last resort, not as the plaintiff's first recourse. [7]

The most common reasons given for the exhaustion requirement include judicial concerns that parallel proceedings or, worse, a complete bypass of probate will undermine the authority of probate courts and upset the administration of estates. Requiring that litigants first exhaust their probate or equity remedies avoids the potential of collateral attacks; see, e.g., *Jackson v. Kelly*, 345 Ark. 151, 160 (2001); and conflicting judgments. The exhaustion requirement ensures that assets that belong to the estate are restored to estate, which further ***22** enhances stability and certainty in the administration of estates -- a significant policy consideration.

Where there exists a comprehensive, statutory code for the settlement of estates and quieting title, the tort, if deployed prematurely, has the potential for creating great mischief. The exhaustion requirement "reconciles the competing interests of compensating injured parties with preserving the goals of the probate scheme." *Umsted v. Umsted*, 446 F.3d 17, 22, A.A.1 (RI) 2006.

The goal of judicial efficiency provides another reason why jurisdictions require that the parties first litigate the underlying issues in the probate court. The exhaustion requirement ensures that there will not be premature adjudication of the tort action. A necessary element of the tort, e.g., the question of damages, is contingent upon the settlement of the estate. For example, if claims of the decedent's creditors consume the entire estate, even if all the other elements of the tort are established, there would still be no viable claim as there are no damages.

***23 The superior court erroneously concluded that statute of limitations for the plaintiff's tortious interference with an expected inheritance claim commenced upon the plaintiff's filing of her probate complaint and did not toll even though the plaintiff had not yet exhausted her probate remedies.**

For legal as well as logistical reasons, the statute of limitations should toll pending the resolution of related probate matters. In *Umsted*, the U.S. Court of Appeals, First Circuit, concluded that the public policy interests in preserving the statutory scheme and the probate court's jurisdiction over estates requires that a plaintiff first exhaust her probate remedies before filing a tortious interference with expected inheritance claim in superior court. The *Umsted* court cited this court's *Labonte* decision, *supra* at 321-322, for support that such a "view is not novel.

> Massachusetts, which recognizes tortious interference with an expectancy of inheritance, but also has a statutory scheme that similarly anticipates the potential for wrongfully induced inter vivos conveyances, endorses the exhaustion requirement that we adopt here. *See Labonte v. Giordano*, 426 Mass. 319, 687 N.E.2d 1253, 1256 (1997). In *Labonte*, a daughter alleged that her brother had tortiously induced their mother to transfer title of her house to him. In upholding the superior court's dismissal, the Supreme Judicial Court acknowledged that a will contest in probate court would not have provided adequate relief because the house had been transferred out of the mother's estate. *Id*. Nevertheless, Massachusetts probate law provided other remedies that could have adequately vindicated the daughter's interests. *Id*. ***24** After her mother's death, the daughter could have requested the executor of the estate to sue her brother. *Id*. (citing Mass. Gen. Laws ch. 230, § 1). If the executor refused, the daughter would have had standing to sue on behalf of the estate. *Id*. (citing Mass. Gen. Laws ch. 230, § 5). Given the adequacy of these statutory procedures, the SJC declined to expand the scope of the tort." *Umsted*, supra, at 22.

In the Commonwealth, there exists no controlling authority on whether the statute of limitation for the tort tolls pending resolution of the probate matter nor does any law exist directly on point regarding when the tort accrues.

This court has, on at least two other occasions, signaled a preference that litigants first pursue their claims through probate or equity before bringing an action at law. See *Brignati v. Medenwald*, 315 Mass. 636 (1944).
"The plaintiff here had undoubtedly a remedy in the Probate Court where, if she proved the undue influence which she now alleges, the court would have refused to probate the instrument and the injury which she now alleges would have been averted." *Id*. at 638-639.

See also, *Monach v. Koslowski*, 322 Mass. 466 (1948).
"A remedy in equity where the plaintiff may lay hold of the property in the hands of the wrongdoer would be preferable in many cases to an action in tort. ... Damages at best are only an approximation of the loss, while relief in equity, by requiring the wrongdoer to transfer the intended devisee or legatee that which would have gone to him but for the fraud of the former gives the intended beneficiary exactly what he would ***25** have received in the absence of such fraud." *Id*. at 470-471.

The lower court did not find the *Umsted* court's reasoning persuasive and dismissed the *Labonte, Bignati*, and *Monarch* opinions, *supra*, as inapplicable. The lower court argues that tolling the statute when a tort claim is ripe is contrary to Massachusetts law. RA p. 43.

The lower court makes an assumption that an underlying probate contest automatically provides a *prima facia* case for the tort and, therefore, the tort is sufficiently fit for adjudication. More troubling than that assumption is the lower court's response to concerns regarding the infringement of the probate court's authority.

The lower court posited that those "evils" can be avoided since the plaintiff can file, simultaneously, her probate suit and her tort action and, then, request an interdepartmental assignment pursuant G.L. c. 211B, §9. RA p. 46. Unfortunately, the lower court's solution might very well cause even further havoc with the division of labor and jurisdiction among courts.

First, consolidation is not mandatory and so the lower court's approach would not necessarily avoid the myriad of practical concerns, *supra* at 22. The lower court's consolidation approach also ignores the major difference in ***26** emphasis and purpose between the superior and probate courts (torts are *in personam* actions focused on a plaintiff's injuries versus *in rem* proceedings in probate which involves the disposition of property). Nor would consolidation be efficient or even feasible when there exist differing standards of proof (e.g., preponderance of the evidence for torts versus clear and convincing evidence in will contests); the rights of the parties (e.g., a right to a jury trial for torts versus the absence of that right in probate and equity proceedings); questions over venue (e.g., for torts the location of the defendant typically controls versus in probate where the domicile of the decedent dictates) and, lastly, forum selection (federal courts in tort diversity actions versus state courts for matters exclusive to probate).

Perhaps most critically though, the lower court's approach simply begs the question: Why bother with the probate court at. all?

Candidly, what disappointed heir wouldn't be delighted to bypass the, at-times-arcane, probate process; directly file a claim in superior court; and collect his or her expected inheritance?

There exists one very good reason to require that litigants first avail themselves of remedies through ***27** probate or equity - those judgments ensure that the assets are restored to the testator's probate estate. The aggrieved heir is not the only party that benefits from the statutory rules governing the administration of estates. When the probate court decrees an estate settled

it has protected not only the interests of the plaintiff but also other parties with an interest in the estate, e.g., creditors or other beneficiaries.

Requiring that the litigants first resolve the matters through probate proceedings also addresses another concern - i.e., the "ripeness" or the' timing of the tort claim. Until the estate has been probated, damages remain speculative at best. *Roll v. Edwards*, 156 Ohio App. 3d 227, 237 (2004). One of the most notable features of the claim is the possibility that a defendant may have, in fact, tortiously interfered with a beneficiary's expected inheritance and yet there will be no damages. For example, under Medicaid/MassHealth regulations, the Commonwealth may have a lien against the estate for the benefits it provided and that lien may consume the entire probate estate, including the restored assets.

Very simply until creditors have an opportunity to perfect their claims, damages, if any, remain uncertain. The existence of damages provides the distinction between a ***28** disappointed heir and an heir who has suffered appreciable harm.

Requiring the exhaustion of probate remedies also avoids an inherent flaw of the lower court's reasoning with respect to this case. The court assumed that at the time Ms. Coyne filed her probate claim she had sufficient facts to complain of Ms. Nascimento's tortious interference with an expected inheritance. But Ms. Coyne didn't. Filing a probate suit should not be an automatic trigger for the statute limitations applicable to the tort.

It may be only through the probate process that a disappointed heir learns he or she has been harmed and or who is responsible for that harm. Facts often emerge during the administration of the estate, e.g., the filing of the inventory or 1st account, from which a prospective beneficiary may discern that he or she has suffered an appreciable harm at the hands of the tortfeasor.

While there may be circumstances where the facts regarding the unlawful conduct are sufficiently known, e.g., when the underlying probate matter involves claims of undue influence or fraud, both of which require that the plaintiff plead facts with particularity, see Mass. R. Civ. P. 9(b) that jurisprudential logic does not necessarily apply to claims involving allegations of breach of ***29** fiduciary duties. Since a breach may well occur through negligence, mistake, or good-faith reliance on counsel.

In this case, Ms. Coyne could not have filed simultaneous complaints in the probate and the superior courts because in August of 2003, when she filed her probate suit, she lacked the factual basis to allege that Ms. Nascimento tortiously abused her trust. Ms Coyne did not know of her sister's bad faith until February of 2004.

C. Actual Knowledge

Even if this Court does not endorse the tolling of the statute of limitations pending resolution of matters in the probate court, the lower court's judgment with respect to what triggered the statute of limitations in the plaintiff's superior court case should be reversed.

The Superior Court erroneously concluded that 1.) the plaintiff's probate complaint constituted "actual knowledge" that the defendant repudiated her trust and, 2.) by implication, that the plaintiff knew that the defendant, in breaching her trust, also held the requisite intent and acted in an unlawful way to interfere with the plaintiff's inheritance and, therefore, 3.) the statutory clock on the plaintiff's tort began to run when the plaintiff filed her probate complaint.

The lower court concluded, as a matter of law, that Ms. Coyne's probate complaint constituted "actual ***30** knowledge" of Ms. Nascimento's repudiation of her fiduciary-duties and that knowledge, consequently, commenced the statute of limitations for her tortious interference claim.

There exist obvious problems with the lower court's approach in relying on the probate complaint to bar Ms. Coyne's tort action. First, Ms. Nascimento never repudiated her trust. In fact, Ms. Nascimento continues to maintain that she acted in good faith

in making the transfers. Ms. Nascimento's representations, denials, and defenses persistently reiterate that she acted within her authority, consistent with Mr. Coyne's interests and/or wishes, and at the direction of counsel.

> "An actual knowledge rule recognizes the dependent status of the beneficiary vis-à-vis the fiduciary, and protects the beneficiary's legitimate expectation that the fiduciary will act with the utmost probity in all matters concerning the relationship. *O'Connor*, *supra*, 551.

With a twist of irony, the lower court imputes to Ms. Coyne "actual knowledge" of something Ms. Nascimento vehemently denies. In support of its decision, the lower court cites *Doe supra* at 255: "[o]nly when the beneficiary's harm at the fiduciary's hands has 'come home' to the beneficiary ... does the limitations clock begin to run."

***31** But the lower court fails to explain how, even if Ms. Coyne did have actual knowledge in August of 2003 that Ms. Nascimento repudiated her trust, that equates to knowledge that Ms. Nascimento purposely and tortiously abused her trust in an effort to frustrate Mr. Coyne's intent regarding the disposition of his estate.

A complaint alleging tortious interference with an inheritance will be dismissed if it fails to allege facts that speak to the "unlawful means" used to interfere with the expected inheritance. *Ross v. Wright*, 286 Mass. 269 (1934). See also *Labonte*, *supra* at 319, fn 1.

"Unlawful means include duress, fraud, or undue influence." *Id.*, fn 4, citing *Hegarty v. Hegarty*, 52 F. Supp. 296, 300 (D. Mass 1943). Unlike claims involving fraud, duress, or undue influence, which require that plaintiff's plead facts with specificity; Mass. R. Civ. P. 9(b); and which, therefore, presumably directly address the unlawful means used by a defendant (a necessary element of the tort), breaches of fiduciary duty, including acts of self-dealing, may result from negligence or mistake and not from misconduct or the intentional, tortious abuse of one's trust. See, e.g., *Gagnon v. Coombs*, 39 Mass. App. Ct. 144, (1995). ***32** "Such self-dealing by an agent, in the absence (as here) of distinct authority from the principal expressly granted in the empowering instrument, has been continuously and uniformly denounced as one of the most profound breaches of **fiduciary duty*, irrespective of the agent's good faith*** and however indirect or circuitous the accomplishment of the benefit to the agent." *Id*. at 157. (Emphasis added.)

The lower court imputes actual knowledge to Ms. Coyne that she simply did not have in August of 2003 and assumes facts regarding Ms. Nascimento's intent and unlawful conduct that were not known at that time.

"Mere suspicion or mere knowledge that the fiduciary has acted improperly does not amount to actual knowledge the plaintiff has suffered harm." *Doe*, supra at 255.

In her probate complaint, Ms. Coyne, alleged breach of fiduciary duty based on *information and belief* that Ms. Nascimento had improperly transferred assets. Ms. Coyne only knew that Ms. Nascimento had made the transfer using as her authority Mr. Coyne's power of attorney; that Attorney Amaru notarized the deed; that Ms. Nascimento maintained that she was acting in good faith, pursuant to Attorneys Loughran and/or Amaru's legal advice in making the transfers; and, that Ms. Nascimento asserted she had no duty to restore the assets to the Mr. Coyne's estate.

Ms. Coyne's knowledge of Ms. Nascimento's unlawful conduct came considerably later and only after Ms. Coyne ***33** had the opportunity to depose Attorney Amaru in February 2004.

The defendant relies on *Calautti v. Pasquarello*, Superior Court at Middlesex, 2000 Mass. Super. LEXIS 256, (2000) (an undue influence challenging the conveyance of a deed) as a defense from liability. RA p. 84. *Calautti* related the commencement of the tort action for undue influence back to the time of the conveyance. The facts of that case are easily distinguished from those in this matter. *Calautti* holds no persuasive value under these circumstances.

When a defendant attempts to shield herself from liability using the cloak of an affirmative defense, the focus of the court, in determining the applicability of a procedural bar, ought to be on what the beneficiary actually knew, especially when "instead of flatly rejecting a demand or request [the fiduciary] gives some apparently good or plausible reason for his noncompliance." *Lattuca*, *supra* at 214. Courts: "must remain cognizant of the strong public policy favoring the protection of beneficiaries of fiduciary relationships, and the equally strong public policy of imposing reasonable limits on liability." *O'Connor*, *supra*, at 551. ***34** "Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ... If the plaintiff responds to a defendant's motion by alleging facts that, if proved at trial would bring the plaintiff's claims outside the impact of the statute of limitations, then the defendant is not entitled to summary judgment." *Id*. at 550. (Citations and quotation marks omitted.)

Ms. Coyne did not know of her sister's intentional, unlawful conduct until late February 2004. She filed her tortious interference claim in October of 2006, within the 3-year period of the statute of limitations for torts. Accordingly, the judgment of the lower court ought to be reversed.

D. Equitable Tolling

In light of the lack of clarity regarding when and how the statute of limitations is triggered in cases involving allegations of tortious interference with an expected inheritance and given that the defendant suffered no prejudice by the plaintiff's 10-week delay in filing her tort claim, the court should equitably toll the statute of limitations.

If this court concludes that the tort commences and is not tolled pending the probate or equity proceedings and, further, that Ms. Coyne had actual knowledge of her sister's intentional, unlawful interference with her expected inheritance by virtue of her probate complaint, the statute should still be tolled.

***35** When the failure to timely file a cause of action is not attributable to a plaintiff's neglect but, rather, caused by counsel's misunderstanding of applicable law, the interests of equity suggest that statute be tolled. See, e.g., *Gates*, *supra* at 473.

The decision not to file the plaintiff's cause of action until after the conclusion of the probate matter was made by counsel and based on a belief that Ms. Coyne's tort action was not ripe until the equity matter concluded; in reliance on analogous, persuasive authority, see *Monach*, *supra;* and, evidently, an overly literal understanding of what constitutes actual knowledge in the context of a tortious interference with an expected inheritance claim when the unlawful conduct involved a tortious abuse of fiduciary duty.

Given that the probate matters between the parties have been extensively litigated, the decision to wait also served the interests of judicial efficiency and economy for both the courts and the parties in that the probate court's ruling and findings could be used to avoid a trial on the issue of Ms. Nascimento's liability. (Damages still continue to accrue.)

Moreover, Ms. Coyne's filing of her tort complaint, a little more than 2 months after the expiration of the ***36** statute of limitations, caused no harm to Ms. Nascimento who, for more than 4 years, repeatedly used dilatory tactics in an effort to delay the resolution of the probate matter and avoid the probate court's judgment. Ms. Nascimento was on notice that the Ms. Coyne sought to recover her damages, including attorney fees.

Ms. Coyne has at all times been diligent in pursuing and defending claims associated with her father's estate. She has been successful in restoring Mr. Coyne's assets to his estate, but only at a cost.

Those jurisdictions that allow a claim for tortious interference with an expected inheritance endorse the fundamental principle that for every wrong justice supplies a remedy. Ms. Coyne ought to be made whole to the extent the law permits. Probate courts

lack statutory authority to adjudicate tort actions and award damages. Mass. G. L. c. 215 §§ 3, 6. Although grateful that the probate court restored Mr. Coyne's assets to his estate, the probate court did not hold Ms. Coyne accountable for her bad acts - it merely placed her back to the position she would have been had she not made the unlawful transfers.

Successful, intentional tort claims hold defendants legally and **financially** accountable for their unlawful conduct and serve as deterrent to others would be similarly ***37** tempted to use unlawful means to enrich themselves at the expense of others.

An overly restrictive application of procedural requirement may very well compromise the interests of justice --an equitable tolling of the statute in this case promotes them.

VII. CONCLUSION

Financial **exploitation** of **elders** by those whom they depend often goes undetected during their lifetimes. It falls to their intended beneficiaries, who serve as their posthumous guardians, to protect the descendant's right to dispose of his or her property, freely and without interference. The ancient probate process serves important contemporary functions in the administration of estates. The probate courts have a long tradition of resolving disputes, ensuring that society honors the intent of the descendent, and that assets unlawfully taken are restored to the estate. What a probate court cannot do, however, is hold the wrongdoer to account.

Only the superior court has jurisdiction to make Ms. Coyne whole. It seems both wrong and unfair that a procedural rule - the statute of limitations - should defeat her legitimate claim.

***38** Ms. Coyne thanks this court for its time and consideration. She respectfully requests that this court provide her with the following relief:
1. Reverse the lower court's judgment granting the Defendant's Cross-Motion for Summary Judgment and remand for further proceedings consistent with this court's opinion;

2. Award her fees and costs incurred in this appeal; and

3. Such other relief as the court deems just and fair.

Footnotes

1 New York Post, Anthony *Marshall gets 1 to 3 years for swindling mother*. December 21, 2009. Source: http:// www.nypost.com/p/news/local/manhattan/astor_son_greed-hard_to_fathom-prosecutor_DALQL8dmj562nPePzv7kO See also, *People v. Anthony Marshall, Francis Morrissey*, 06044-2007, New York Supreme Court, New York County (Manhattan) (2009).

2 *Marshall v. Marshall*, 547 U.S. 293 (2006). Vickie Lynn Marshall (better known to most as the late Anna Nicole Smith) sued her stepson, Pierce Marshall, for his tortious interference with a gift she expected from her late husband, J. Howard Marshall. The matter made its way from Federal Bankruptcy Court to the District Court to the Court of Appeals for the Ninth Circuit before reaching the U.S. Supreme Court, which reversed the Ninth Circuit's reversal of the District Court's judgment that awarded substantial ($44.3 million) compensatory and ($44.3 million) punitive damages to Ms. Marshall.

3 Abbreviations: RA = Record Appendix, hereinafter RA; Trial Transcript = TT; Deposition Transcript = DT; Trial Exhibit = TE. The record appendix includes pleadings, exhibits, and documents from the superior court claim, *Coyne v. Nascimento*, Superior Court at Middlesex, Docket No. 06-03696, and the underlying probate matter, *Coyne v. Nascimento*, Probate Court at Middlesex, Docket No. 03-E-0115-GC; the trial transcript and redacted trial exhibits are from the probate matter. Please see *Coyne v. Nascimento*, Appeals Court, Docket No. 2007-P-0206, for additional information.

4 Ms. Nascimento's claim for services is now before the probate court, pending resolution (In *re: Estate of James A. Coyne*, Probate Court at Middlesex, Docket No. 02P4544EP1).

5 The probate court (DiGangi, J.), on October 20, 2003, declared the transfer of the deed null and void. The court, relying solely on language within the four-corners of Mr. Coyne's power of attorney, did not make any findings of fact regarding Ms. Nascimento's good or bad faith.

6 For the continuum of approaches across the country to tortious interference with an expected inheritance claims see: Diane J. Klein, *Revenge of the Disappointed Heir: Tortious. Interference with Expectation of Inheritance - A Survey with Analysis of State Approaches in the Fourth Circuit,* 104 W. Va. L. Rev. 259 (2002); 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 (2003); 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 (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); Diane J. Klein, *Go West, Disappointed Heir: Tortious Interference with Expectation of Inheritance - A Survey with Analysis of State Approaches in the Pacific States,* 13 Lewis & Clark L. Rev. 209 (2009).

See also, Irene D. Johnson, *Tortious Interference with Expectancy of Inheritance or Gift - Suggestions for Resort to the Tort*, 39 U. of Toledo L. Rev. 769 (2008) and at http://digitalcommons.pace/edu/lawfaculty/476/.

7 Marilyn Marmai, *Tortious Interference with Inheritance Primary Remedy or Last Recourse,* 5 Conn. Prob. L.J. 295 (1991).

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