

THE STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY

TRUST DOCKET  
6<sup>TH</sup> CIRCUIT COURT  
PROBATE DIVISION

MARJORIE SWENSON AND OLIVER ROBLING, AS TRUSTEES AND  
BENEFICIARIES OF THE NANCY R. HOLBROOK EXEMPT TRUST

v.

TONI SILK, EXECUTRIX OF THE ESTATE OF E. ALLEN HOLBROOK, JR. AND  
LINDA CHRISTO

313-2018-EQ-00240

LINDA CHRISTO

v.

TONI SILK, EXECUTRIX OF THE ESTATE OF E. ALLEN HOLBROOK, JR.

313-2018-EQ-00407

ORDERS

On September 25, 2018, the Court held a scheduling/status conference to address the status of the above captioned cases, consider consolidation of Marjorie Swenson & Oliver Robling, as Trustees and Beneficiaries of the Nancy R. Holbrook Exempt Trust v. Toni Silk, Executrix of the Estate of E. Allen Holbrook, Jr. and Linda Christo, No. 313-2018-EQ-00240 (the "Equity Matter"), with the Linda Christo v. Toni Silk, Executrix of the Estate of E. Allen Holbrook, No. 313-2018-EQ-00407 (the "Estate Matter"), and, if applicable, to schedule them for resolution as soon as possible. It also considered argument on a *Motion to Dismiss Count IV: Intentional Interference With*

*Inheritance (Against Linda Christo)*, filed in the Equity Matter by Respondent Linda Christo. See Equity Index ## 15-16. Marjorie Swenson and Oliver Robling, as trustees and beneficiaries of the Nancy R. Holbrook Exempt Trust objected to the *Motion to Dismiss Count IV*. See Equity Matter Index #19. Attending the hearing were: Attorney David P. Eby on behalf of Marjorie Swenson and Oliver Robling, petitioners in the Equity Matter (collectively the "Equity Petitioners"); Attorney Neil B. Nicholson and Attorney Roy S. McCandless on behalf of Linda Christo, respondent in the Equity Matter and Petitioner in the Estate Matter; and Attorney Ralph F. Holmes on behalf of Toni Silk, Executrix of the Estate of E. Allen Holbrook, and respondent in both the Equity and Estate Matters. After consideration of the pleadings, the Court **ENTERS** the following **ORDERS**:

- The *Motion to Dismiss Count IV* is **GRANTED**. See Index #15.
- In light of the dismissal of Count IV, the Equity Petitioners are granted leave to amend their *Complaint for Damages*. See Equity Matter Index #1. They are **DIRECTED** to submit an amended pleading on or before **November 15, 2018**.
- The Court **DEFERS** scheduling for resolution the *Complaint for Damages* until it receives the amended petition/complaint and any answers and responses filed thereto. After receipt of those pleadings, it will proceed to establish deadlines for discovery and trial. The Court, however, encourages the parties, in the interim, to consider scheduling mediation with a Trust Docket mediator. The parties are encouraged to confer and contact Denise Pearl, Court Assistant Specially Assigned to the Trust Docket if the parties deem it practicable.
- The Court **DEFERS** consideration of dismissal of *Linda Christo's Cross-Claim Against Toni Silk, Executor of the Estate of E. Allen Holbrook* filed in the Estate Matter, see Estate Matter Index #1, on the basis that it was filed outside the applicable statute of limitations. See RSA 556:2-:3. Although no formal pleading has been filed seeking dismissal on this ground, at the hearing, counsel for the Executrix contended that the *Cross-Claim* was not timely filed and should be dismissed. A court may dismiss a case sua sponte on those grounds, see *Exeter Hosp. v. Hall*, 137 N.H. 397, 400 (1993), and this Court is inclined to do so. Although the Executrix briefly raised the defense in her *Answer to the Cross-Claim*, see *id.* at 8-9, 12 (Index #6), and mentioned it at the hearing, the Court

deems it is most prudent to allow Ms. Christo an opportunity to file a responsive pleading before a final decision on dismissal is considered. See Exeter Hosp., 137 N.H. at 399-400. Accordingly, Ms. Christo is **DIRECTED** that if she intends to respond, she must file an objection on or before **November 15, 2018**.

- The Court **DENIES** the request to consolidate the Equity and Estate Matters. In the event that it does not dismiss the Estate Matter, it will reconsider its ruling on consolidation.

#### I. Motion to Dismiss Count IV

The Court begins with Ms. Christo's *Motion to Dismiss Count IV*. See Equity Matter Index #19. In her pleading, Ms. Christo contends that the Court should dismiss that claim since the tort of "intentional interference with inheritance" "is unnecessary, unwarranted, and never before recognized in New Hampshire." Id. at 1.<sup>1</sup> The Equity Petitioners respond that the Court should deny the *Motion to Dismiss* as although New Hampshire Supreme Court has not determined whether to recognize intentional interference with inheritance as a cause of action in this state,<sup>2</sup> it is well-recognized in many other jurisdictions, and this Court should allow their claim. They also contend that, in their status as beneficiaries, they lack an adequate remedy in probate.

In ruling on a motion to dismiss, this Court must determine "whether the [petitioners'] allegations are reasonably susceptible of a construction that would permit recovery." Harrington v. Brooks Drugs, Inc., 148 N.H. 101, 104 (2002) (quotation

<sup>1</sup>Notably, Ms. Christo maintains that were the Court to recognize a cause of action based upon intentional interference with inheritance, she reserves her right to a jury trial. Id. However, Ms. Christo, pursuant to RSA 547-11-d, has waived her right to a jury trial for failing to request one "at the time of the defendant's initial pleading with the court." Id.

<sup>2</sup>The Court observes that although "[a]ll questions pertaining to the validity, interpretation, and administration" of the E. Allen and Nancy Holbrook Family Trust, and the Exempt Trust created under it are governed by California law, see Complaint for Damages Exh. A, art. 11.4 (Equity Matter Index #1), none of the parties have contended that it governs evaluation of dismissal of Count IV. The Court agrees, as Count IV concerns a tort alleged to have been committed in New Hampshire. The extent that California law governs the remaining claims will be addressed as necessary in future litigation. Notably, later amendments to the revocable Survivor Trust indicate that the laws of the State of New Hampshire govern its validity, interpretation, and administration. See Id. Exh. A, E Allen Holbrook Trust Restatement art. 6.3.

omitted). In doing so, the Court must “assume the truth of the facts alleged in the [petitioners] pleadings and construe all reasonable inferences in the light most favorable to [them].” *Id.* (quotation omitted). “Although the trial court’s decision on a motion to dismiss is normally based solely on the allegations in the pleadings, if additional evidence is submitted, without objection, the trial court should consider it when making its ruling.” Delaney v. State, 146 N.H. 173, 175 (2001)(quotations omitted).

Accordingly, the Court recites the following facts as pleaded in the *Complaint for Damages*. See Equity Matter Index #1. In 1991, E. Allen Holbrook and Nancy Holbrook executed the E. Allen and Nancy Holbrook Family Trust. See *Complaint for Damages* Exh. A (Equity Matter Index #1). Respondent Linda Christo is a long-time “caregiver” of Mr. Holbrook. According to the terms of the E. Allen and Nancy Holbrook Family Trust, after the death of either E. Allen or Nancy, two separate trusts, a revocable “Survivor Trust”<sup>3</sup> and an irrevocable “Exempt Trust” were to be created. *Id.* Both Marjorie Swenson and Oliver Robling are successor co-trustees of the Exempt Trust and the only current beneficiaries of it.<sup>4</sup> *Id.* Ms. Silk is the executrix of the Estate of E. Allen Holbrook. See Estate of E. Allen Holbrook, No. 313-2017-ET-00487 (Index #20).<sup>5</sup>

The Survivor Trust was established to provide for the needs of the survivor of E. Allen and Nancy, who could use income from that trust and could invade the principal as necessary for support. See *Complaint for Damages* Exh. A (Equity Matter Index #1).

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<sup>3</sup> The Court observes that although this formerly revocable trust is referred to as the “Survivor Trust” in the E. Allen and Nancy Holbrook Family Trust, later amendments executed after Nancy’s death designate it as the “E Allen Holbrook Trust.” See *Complaint for Damages* Exh. A.

<sup>4</sup> This irrevocable trust is referred to as the “Exempt Trust” in the E. Allen and Nancy Holbrook Family Trust, but is also referred to as the Nancy R. Holbrook Exempt Trust. *Id.*

<sup>5</sup> This is a separately docketed and electronically-filed estate administration matter.

Income from the Exempt Trust could also be distributed to the survivor. Invasion of principal of the Exempt Trust is authorized, however, only if necessary and after a showing that other assets and sources of income are insufficient to support his/her needs. Id. The survivor of E. Allen and Nancy would be trustee of the two trusts. After the death of the survivor, any remaining assets of the Exempt Trust were to be distributed to certain relatives,<sup>6</sup> namely, the Equity Petitioners. Under the original version of the Survivor Trust, any real property left in the Survivor Trust was to be distributed to Marjorie Swenson, if living, if not to Oliver Robling. Id. Other assets were to be used for certain charitable gifts and then distributed to designated family members. Id. That revocable trust was later substantially amended such that significant real and personal property was to be distributed to Ms. Christo after Mr. Holbrook's death. Id. After Nancy died in 2008, E. Allen became trustee of both the Survivor and Exempt Trust. At the time of Nancy's death, the Exempt Trust is alleged to have held assets over a million dollars and the Survivor Trust is alleged to have held approximately two million dollars in liquid assets. *Complaint for Damages* ¶¶1, 10 (Index #1).

E. Allen died in June 2016. After his death, the Equity Petitioners became successor co-trustees of the Exempt Trust. They filed a *Complaint for Damages*, see Index #1, in April 2018 in both their capacities as successor co-trustees and beneficiaries, against the Executor of the Estate of E. Allen Holbrook, Ms. Silk, and Linda Christo alleging six counts, including "intentional interference with inheritance." The Petitioners allege that E. Allen, as trustee of the Exempt Trust,

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<sup>6</sup> Since E. Allen and Nancy did not have children, various family members or their issue were named beneficiaries. Currently, only the Equity Petitioners are the beneficiaries.

improperly transferred over a million dollars in assets out of the Exempt Trust to benefit himself and his caregiver, Ms. Christo, to the detriment of the interests of Exempt Trust beneficiaries as invasion of that trust was unnecessary for his support. They also allege that these transfers were the result of undue influence exerted by Ms. Christo given the diminished capacity of E. Allen to manage his financial affairs after Nancy died.

Specifically, it is alleged that E. Allen did not use the assets of the Survivor Trust as intended, but instead distributed nearly all assets of the Exempt Trust first, and that "not only did Mr. Holbrook have no need for the Exempt Trust principal, a substantial amount of the funds [were] removed . . . [and] placed into joint accounts with his caregiver, Linda Christo or otherwise transferred or gifted" to her. *Complaint for Damages* ¶15. The Equity Matter Petitioners also alleged that Mr. Holbrook's ability to manage his finances diminished significantly in his later years, and that he depended on Ms. Christo for assistance. They also allege that: (1) Ms. Christo had "significant control" over Mr. Holbrook; (2) "was fully aware" of the terms of the trusts; (3) "encouraged, assisted, and unduly influenced Mr. Holbrook in his efforts to remove significant funds from the Exempt Trust;" and (4) "encouraged and assisted" in transfer of those funds to accounts she held jointly with Mr. Holbrook or "otherwise into accounts for her benefit." *Id.* at 5-6.<sup>7</sup>

The *Complaint for Damages* filed by the Equity Petitioners alleges six counts, namely: (1) a breach of trust claim against Mr. Holbrook's estate (Count I); (2) breach of fiduciary duty against Mr. Holbrook's estate (Count II); (3) conversion against Mr.

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<sup>7</sup> The Equity Petitioners later were granted, by stipulation, an attachment on two properties transferred to Ms. Christo as later-added beneficiary of the Survivor Trust. See Index ## 2, 11, 12.

Holbrook's estate (Count III); (4) intentional interference with inheritance against Ms. Christo (Count IV); (5) restitution for unjust enrichment against Ms. Christo (Count V); and (6) imposition of a constructive trust as a result of undue influence against Ms. Christo (Count VI). Although it is unclear from the face of the pleading, it appears that Counts I-III are asserted by the Equity Petitioners in both their capacities as successor co-trustees and beneficiaries. The language of Counts IV-VI grounds entitlement to relief on the beneficiaries' rights to funds that should have remained in the Exempt Trust for their benefit, however it is unclear if they assert these claims only as beneficiaries or as co-trustees of the Exempt Trust on behalf of the trust beneficiaries.

*A Motion to Dismiss IV: Intentional Interference with Inheritance and a Memorandum of Law* was filed by Ms. Christo, see Index ##15-16, contending that the tort alleged in Count IV has not yet been recognized in New Hampshire. She alleged that the count should be dismissed as: (1) it is unlikely the tort will be adopted in New Hampshire; (2) other claims made, restitution for unjust enrichment and constructive trust, if proven, provide for an adequate recovery; and (3) that the "effort to mix a tort claim, for which Ms. Christo has right to a trial by jury, with two other equitable claims to be decided by the Probate Court, creates an unworkable formula." Ms. Christo also alleges generally that Mr. Holbrook did not breach any of his duties as trustee, and that Ms. Christo was a longtime friend of both Mr. and Mrs. Holbrook, who took care of Mr. Holbrook in his later years and that she did not unduly influence or otherwise manipulate him to act improperly or make asset transfers to her.

**a. Intentional Interference with Inheritance**

The Court will first address the issue of whether the allegation of intentional interference with inheritance asserts a cognizable claim in New Hampshire. As part of its analysis, the Court will briefly discuss the adoption or rejection of the tort in other jurisdictions, and where adopted, its contours and application. In general, many courts define the tort as arising where “[o]ne who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.” Morrill v. Morrill, 712 A.2d 1039, 1041 (Me. 1998) relying on RESTATEMENT (SECOND) OF TORTS §774(B)(1979). Actions asserting intentional interference with inheritance usually arise from “three types of interference: (1) interference with the execution, alteration, or revocation of a will; (2) suppression, spoliation, destruction, or loss of a will; and (3) deprivation of an inheritance by inducing an inter vivos transfer.” LIABILITY IN DAMAGES FOR INTERFERENCE WITH EXPECTED INHERITANCE OR GIFT, 22 A.L.R.4th 1229 §2 (2018 Update). Some states that have adopted the cause of action require petitioning parties to satisfy the elements set forth in the Restatement (Second) of Torts §774(B), namely:

- 1) an existence of an expectancy of inheritance in the plaintiff;
- 2) an intentional interference by a defendant(s) with that expectancy of inheritance;
- 3) conduct by the defendant involving the interference which is tortious, such as fraud, duress or undue influence, in nature;
- 4) a reasonable certainty that the expectancy of inheritance would have been realized, but for the interference by the defendant; and
- 5) damage resulting from the interference.



Firestone v. Galbreath, 616 N.E.2d 202, 203 (Ohio 1993); see, e.g., Doughty v. Morris, 871 P.2d 380, 384 (NM 1994).

This case presents a claim where there is *no challenge* to the validity of the estate planning documents, in this case the Exempt Trust, but instead seeks to invalidate inter vivos transfers that reduced the assets of an irrevocable trust. See generally, LIABILITY IN DAMAGES FOR INTERFERENCE WITH EXPECTED INHERITANCE OR GIFT, 22 A.L.R.4th 1229 §7 (2018 Update); Wilson v. Fritschy, 55 P.3d 997 (N.M. 2002)(cause of action challenging inter vivos transfer sustainable if there is no adequate remedy in probate); Copelan v. Copelan, 583 S.E.2d 562 (Ga. Ct. App. 2003)(no cause of action in challenge to inter vivos transfer); Cyr v. Cote, 396 A.2d 1013 (Me. 1979)(recognizing cause of action in challenge to inter vivos transfer). Neither of the parties, nor the Court, could discover any New Hampshire Supreme Court cases on point,<sup>8</sup> and case law in other jurisdictions, although mostly favoring adoption, see Marshall v. Marshall, 547 U.S. 293, 312 (2006)(claim of intentional interference with inheritance or gift "widely recognized"), is decidedly split.<sup>9</sup> See generally, Wellin v.

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<sup>8</sup>In Patey v. Peaslee, 101 N.H. 26 (1957), the Supreme Court found an action to impose a constructive trust for the benefit of petitioning heirs-at-law was appropriate where respondent married infirm decedent shortly before her death for the sole purpose of inheriting her property. It found that the heirs-at-law could assert their petition as the respondent's act, if proven, deprived them of their inheritance, and the action was properly maintained by them "upon the doctrine that restitution will be compelled to prevent unjust enrichment." Id. at 29. The Supreme Court further observed "establishment of a constructive trust will not interfere with any vested legal rights but will give effect to equitable rights of others where the legal title to property was obtained through means or under circumstances which rendered it unconscionable for the holder of legal title to retain and enjoy the beneficial interest." Id. (quotations omitted). Accordingly, although the Supreme Court did not recognize a tort of intentional interference with inheritance, it allowed for the possibility of recovery through other equitable means.

<sup>9</sup>Some scholars have quibbled with this characterization by the United States Supreme Court, see John C.P. Goldberg & Robert H. Sitkoff, TORTS AND ESTATES: REMEDYING WRONGFUL INTERFERENCE WITH INHERITANCE, 65 Stan. L. Rev. 335, 364 (2013), however, this Court's review reveals, and, as the Federal District Court for the District of South Carolina observed, it is clear that "a majority of courts that have considered the tort have approved it." Wellin, 135 F. Supp. 3d at 514. Adoption of the tort, however, remains controversial.

Wellin, 135 F. Supp.3d 502, 514 (D.S.C. 2015); compare Harmon v. Harmon, 404 A.2d 1020 (Me. 1979); Hammons v. Eisert, 745 S.W.2d 253 (Mo. Ct. App. 1988)(recognizing tort) with Economopoulos v. Kolaitis, 528 S.E.2d 714 (Va. 2000) Vogt v. Witmeyer, 665 N.E.2d 189 (N.Y. 1996)(not recognizing actions for tortious interference with inheritance).

Some courts that have recognized the tort did so in part on the basis that it was merely an extension of already recognized actions for interference with expected contract, see Doughty v. Morris, 871 P.2d 380, 383-384 (NM 1994), and indeed, as the Equity Petitioners point out, see Objection at 5 (Equity Matter Index #19), New Hampshire has recognized such actions in contract. See Baker v. Dennis Brown Realty, 121 N.H. 640, 644 (1981). This Court, however, proceeds cautiously with recognition of this tort. Notably, certain recent commentary, and a state court decision, have been critical of adoption of the tort in the probate context since it does not easily conform with unique principles that underlie much of probate law, including respect for the donative intent of a testator or settlor, see, e.g., King v. Onthank, 152 N.H. 16, 18 (2005)(intent of testator is the "sovereign guide"); Shelton v. Tamposi, 164 N.H. 490 495 (2013)(intent of settlor is "paramount"), and the inchoate nature of rights under a will until the death of the testator, see, e.g., Wakefield v. Phelps, 37 N.H. 295, 306 (1858)("A will does not take effect, nor are there any rights acquired under it, until the death of the testator"), and thus it may not be appropriate to extend torts that remedy

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As if to prove the point that even the extent of recognition of the tort is controversial, the Court observes that while the United States Supreme Court in Marshall stated that "Texas courts have recognized a state-law tort action for interference with an expected inheritance," the Texas Supreme Court recently observed that "neither this Court nor the [Texas] legislature has ever recognized such an action," that adoption was an "open question." It then specifically declined to do so. Archer v. Anderson, 61 Tex. Sup. Ct. J. 1509; 2018 WL 3090810 at \*2 (June 22, 2018).

interference with expectancies in other contexts to probate matters. See John C.P. Goldberg & Robert H. Sitkoff, TORTS AND ESTATES: REMEDYING WRONGFUL INTERFERENCE WITH INHERITANCE, 65 Stan. L. Rev. 335, 338, 340-55 (2013); accord Archer v. Anderson, 61 Tex. Sup. Ct. J. 1509; 2018 WL 3090810 at \*5 -\*6 (TX 2018).

Notably for the Court's purposes today, many courts which recognize a cause of action for intentional interference with inheritance, limit claims to instances where a party can demonstrate that there is no "adequate remedy in probate."<sup>10</sup> Beckwith v. Dahl, 205 Cal. App. 4<sup>th</sup> 1039, 1056 (Cal. Ct. App. 4<sup>th</sup> Dist. 2012); DeWitt v. Duce, 408 So.2d 216, 218 (Fla. 1981); see, e.g., Jackson v. Kelly, 44 S.W.3d 328, 332-33 (Ark. 2001)(collecting cases). Indeed, the American Law Institute recently published the third draft of a new restatement updating the elements of this cause of action. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM §18 TD Interference with Inheritance or Gift (March 2018). This tentative draft defines the elements of the tort nearly the same as Restatement (Second) of Torts §774(B), however, it specifically requires that a "claim under this Section is not available to a plaintiff who had the right to seek a remedy for the same claim in a probate court." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM §18 TD Interference with Inheritance or Gift (March 2018). Notably, Ms. Christo has provided to this Court at the hearing a 1999 Superior Court opinion by then Judge Dalianis, see Bennett-Lane, et al v. Bennett et al, No. 99-E-0184 (Order dated Oct. 5, 1999), in which she dismissed a claim for intentional interference

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<sup>10</sup>Some courts have made clear that the term "adequate remedy" does not mean that a party may mount a tort challenge in order to receive compensatory damages. See, e.g., Wilson, 55 P.3d at 1006. Instead, they recognize that punitive damages are not a valid expectation of a plaintiff in the inheritance context and thus an "adequate remedy" only encompasses making a party "whole." Id. This view is consistent with New Hampshire probate law that relief given beneficiaries is remedial, not punitive.

with inheritance on the basis that there was already an adequate remedy in probate court. See id.

Although this Court would disfavor adoption of a cause of action based upon intentional interference with inheritance because “[t]ort law is ill-suited to posthumous reconstruction of the true intent of a decedent,” Archer, 61 Tex. Sup. Ct. J. 1509; 2018 WL 3090810 at \*6 (quotations omitted), even if the New Hampshire Supreme Court were to recognize this tort, it may well limit its applicability, as have many, if not most jurisdictions, to instances where there was not an adequate remedy in probate.<sup>11</sup>

Wellin, 135 F. Supp.3d at 517-518. The New Hampshire Supreme Court has, in other contexts, expressed a reluctance to recognize new tort causes of action if other remedial actions are available. See Khater v. Sullivan, 160 N.H. 372, 374-75 (2010); cf. Howe v. City of Nashua, No. 2016-0055, 2016 WL 4413273 at \*3 (N.H. July 8, 2016)(Unreported decision); accord Bennett-Lane, et al v. Bennett et al, No. 99-E-0184 (N.H. Super. Ct)(Dalianis, J., Oct. 5, 1999); see generally, Umsted v. Umsted, 446 F.3d 17, 21-22 (1st Cir. 2006).<sup>12</sup>

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<sup>11</sup>Courts that recognize this exception to application of the tort see it as a “gap filler” so to preclude an injured party from being denied recourse. See John C.P. Goldberg & Robert H. Sitkoff, TORTS AND ESTATES: REMEDYING WRONGFUL INTERFERENCE WITH INHERITANCE, 65 Stan. L. Rev. 335, 368 (2013). However, given that New Hampshire probate courts have broad equitable authority, including the grant of injunctive relief, see RSA 547:3-b, in “all cases within its subject matter jurisdiction,” id., including the administration and settlement of estates, RSA 547:3, I(a)-(b), and trusts, RSA 564-B:2-203; 547:3, I(d) (trusts), and ancillary jurisdiction, RSA 547:3, II(d), over “claims for liquidated or non-liquidated damages or for the recovery of money or property brought on behalf of an estate, trust, conservatorship, or guardianship against a third party,” RSA 547:3-l, such gap filling is likely not necessary. Indeed, since probate courts may entertain actions seeking restitution and imposition of constructive trusts, some would contend that recognition of the new tort is unnecessary. See John C.P. Goldberg & Robert H. Sitkoff, TORTS AND ESTATES: REMEDYING WRONGFUL INTERFERENCE WITH INHERITANCE, 65 Stan. L. Rev. 335, 369-374 (2013).

<sup>12</sup> Indeed, limiting application of the tort also minimizes concerns that it will be unfairly employed to mount collateral attacks on unfavorable rulings in will contests, or by parties seeking a “second bite at the apple.” See generally, Beckwith, 205 Cal. App.4<sup>th</sup> at 1052.

The Court accordingly **GRANTS** the *Motion to Dismiss*. Although it need not predict today whether New Hampshire would adopt the tort, the Court concludes that it would not be available in this case where there is an adequate remedy in probate, namely the already pleaded actions of restitution and constructive trust against Ms. Christo. See Complaint for Damages Counts V, VI (Equity Index #1).

**b. Standing**

The Equity Petitioners contend, however, that there is no adequate remedy in probate as it is doubtful that they possess standing to sue Ms. Christo for restitution or for imposition of a constructive trust *in their capacity as beneficiaries*, see Objection at 6-8, since the underlying cause of action necessary for imposition of a constructive trust is the intentional interference tort. The Court does not find their argument persuasive.<sup>13</sup>

When evaluating whether a plaintiff has standing, "the trial court must look beyond the plaintiffs' unsubstantiated allegations and determine, based on the facts, whether the plaintiffs have sufficiently demonstrated their right to claim relief." Johnson v. Town of Wolfeboro Planning Bd., 157 N.H. 94, 96 (2008) (quotations omitted).

"Standing under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another, with regard to an actual, not hypothetical, dispute, which is capable of judicial redress." State v. Actavis Pharma, 170 N.H. 211, 214 (2017) (quotation and brackets omitted). "In evaluating whether a party has standing to sue, we focus on whether the party suffered a legal injury against which the law was designed to protect." Id. at 215 (quotation omitted); see generally, In re

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<sup>13</sup> At the hearing, Ms. Christo was willing to concede standing, however, the Court must independently determine whether the Equity Petitioners have standing.

Estate of Couture, 166 N.H. 101, 105 (2014)(decendent's heirs had standing to seek a constructive trust based upon theory of unjust enrichment).

Since the Court is evaluating the pleadings in the context of a motion to dismiss, it takes all reasonable inferences from the acts pleaded in favor of the Equity Petitioners. Here, both Count V and Count VI seek equitable remedies, restitution and constructive trust, against Ms. Christo for the same act, namely, that through undue influence over Mr. Holbrook, she manipulated him to improperly transfer funds out of the Exempt Trust for her ultimate receipt, benefit and retention, to the detriment of the Equity Petitioners who would have collected those assets but for her undue influence.<sup>14</sup>

A trial court may impose a constructive trust if it is shown by clear and convincing evidence that: (1) a confidential relationship existed between two persons; (2) one transferred property to another; and (3) the person receiving the property would be unjustly enriched by retaining it. In re Estate of Cass, 143 N.H. 57, 60 (1998). Unjust enrichment, in this context, exists where the property received was obtained through fraud, duress, undue influence, or the violation of a fiduciary duty. Id. It is well-established that: "there are no rigid requirements for imposing a constructive trust . . . [it] is merely the formula through which the conscience of equity finds expression. A constructive trust will be imposed whenever necessary to satisfy the demand of justice." In re Estate of Couture, 166 N.H. at 111–12 (citations and quotations omitted). "The specific instances in which equity imposes a constructive trust are numberless, as numberless as the modes by which property may be obtained through bad faith and unconscientious acts." Id. at 112-13 (quotations omitted).

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<sup>14</sup> The Court observes that while these counts could have been more artfully plead, Counts V and VI, when read in the context of the entire *Complaint for Damages*, assert stand-alone claims. It thus rejects the assertion that these claims will not stand in the absence of an intentional interference with inheritance.

"The doctrine of unjust enrichment is that one shall not be allowed to profit or enrich himself at the expense of another contrary to equity. To state a claim, a plaintiff must sufficiently allege that the defendant was enriched at the plaintiff's expense through either: (1) wrongful acts; or (2) passive acceptance of a benefit that would be unconscionable to retain." Estate of Mortner v. Thompson, 182 A.3d 1260, 1265 (N.H. 2018)(quotations and citation omitted). "[A] trial court may require an individual to make restitution for unjust enrichment if he has received a benefit that would be unconscionable to retain." Id. (quotations omitted). An "unconscionable benefit" is one which "affronts the sense of justice, decency, or reasonableness" or is "[s]hockingly unjust or unfair." Id.

Counts V and VI seek to reverse Ms. Christo's alleged unconscionable retention of assets intended to be held in the Exempt Trust, through imposition of a constructive trust that renders her trustor over those assets on behalf of the Exempt Trust, or restitution of those funds to the Exempt Trust. Clearly, the Equity Petitioners, as successor co-trustees have standing, and possibly a duty, to seek redress of an injury to the Exempt Trust.

The *Complaint for Damages* also alleges that the assets of the Survivor Trust would have been sufficient to support Mr. Holbrook during his life. Accordingly, the Petitioners assert that after Mr. Holbrook's death, it is likely that they would have received distributions from the irrevocable Exempt Trust,<sup>15</sup> whose principal could only be invaded once other sources of support were depleted, but for Ms. Christo's wrongful act of unduly influencing Mr. Holbrook's depletion of the Exempt Trust. Accordingly, the

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<sup>15</sup> As noted supra, the Exempt Trust is irrevocable when created at Nancy's death. See Complaint for Damages Exh. A, art. 9.2 (Equity Matter Index #1).

Equity Petitioners, as beneficiaries of the Exempt Trust, have alleged a cognizable loss. Although not as clear as when they assert claims as successor co-trustees, and not completely independent of acts of the trustees, the beneficiaries of the Exempt Trust, much like the heir-at-law found to have standing in Couture,<sup>16</sup> have standing due to their direct interest in the assets of the Exempt Trust to assert Counts V and VI. Accordingly, the Court rejects the Equity Petitioners' assertion that they are entitled to bring a claim of intentional interference with inheritance because there is no adequate remedy in probate.

Perhaps recognizing that the *Complaint* was not a model of clarity, however, the Equity Petitioners, at the hearing, requested leave to amend the *Complaint for Damages* should the Court dismiss the intentional interference with inheritance claim. Pursuant to RSA 514:9, a trial court may permit a substantive amendment to pleadings "in any stage of the proceedings, upon such terms as the court shall deem just and reasonable, when it shall appear to the court that it is necessary for the prevention of injustice; but the rights of third persons shall not be affected thereby." The Court has broad discretion in deciding whether to allow amendment. *Bel Air Assocs. v. N.H. Dep't of Health & Human Servs.*, 154 N.H. 228, 236 (2006). "Under RSA 514:9, liberal amendment of pleadings is permitted unless the changes would surprise the opposing party, introduce an entirely new cause of action, or call for substantially different evidence." Coan v. New Hampshire Dep't of Envtl. Servs., 161 N.H. 1, 10–11 (2010)(quotations omitted). The Court **GRANTS** the Equity Petitioners leave to amend their complaint. Clarity will assist the Court in evaluating the claims, and the respondents in defending them. The litigation is in its early stages, and as such,

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<sup>16</sup> Presumably independent of the executor.



allowance of amendment will not cause prejudice to the respondents. Accordingly, the Equity Petitioners are **DIRECTED** to submit an amended pleading **on or before November 15, 2018**. After the respondents have submitted answers, the Court will schedule the matter for resolution.

## II. Dismissal of Estate Matter

Following submission of the *Complaint for Damages*, Ms. Christo separately filed a *Cross-Claim* against the Estate on July 5, 2015, asserting four counts, namely: (1) quantum meruit; (2) breach of contract; (3) promissory estoppel; and (4) equitable estoppel. See Estate Matter Index #1. She asserts that she provided substantial assistance to Mr. Holbrook in exchange for and/or reliance on, his promise to transfer certain real property to her. The Executrix responded, asserting, inter alia, that her claims are time barred pursuant to RSA 556:2 and RSA 556:3 since Ms. Christo failed to serve her with a notice of claim and demand for payment within six months of the grant of estate administration. See Estate Matter Index #6.

At the pretrial conference, counsel for Ms. Silk made an oral motion to dismiss<sup>17</sup> on this basis that since the *Petition for Estate Administration* was granted on October 31, 2017, see Estate of E. Allen Holbrook, No. 313-2017-ET-00487 (Index #1), her claim against the estate, filed on July 5, 2018, see Estate Matter Index #1, is late. In essence, Ms. Silk contends that the *Cross-Claim* is simply a demand for payment that should have been filed in accordance with the six-month period to file claims. See RSA 556:3 ("No such action shall be sustained unless the demand was exhibited to the administrator within six months after the original grant of administration"); RSA 556:2

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<sup>17</sup> The Court has not received a written motion to dismiss. It surmises that given the Ms. Silk's representation that the estate may be insolvent, she did so to preserve the assets of the estate. Since timeliness may be raised sua sponte by the Court, it deems submission of an oral motion reasonable.

(notice of claim). At the hearing, Ms. Christo responded that the *Cross-Claim* is merely defensive in nature to the claims made by the Equity Petitioners, and thus does not fall within the ambit of RSA 556:3.

Although the Court is inclined to agree with Ms. Silk, it will **DEFER** dismissal of the *Cross-Claim* pending formal response by Ms. Christo. It notes that although raised as a defense by Ms. Silk, she did not file a formal *motion to dismiss*. Although a court may sua sponte dismiss an action as untimely, see Exeter Hosp. v. Hall, 137 N.H. 397, 400 (1993), it is most fair to allow the potentially dismissed party an opportunity to respond and instruct the Court as to the law and facts supporting continued viability of their action. Id. at 399-400. Accordingly, Ms. Christo is **DIRECTED** that if she intends to respond formally to Ms. Silk's oral motion, she must file an objection **on or before November 15, 2018**. Ms. Silk will be allowed to further respond as she deems fit within ten days of submission of Ms. Christo's responsive pleading. See generally, Cir. Ct. – Prob. Div. R. 58.

### III. Mediation

In her pleadings and at the hearing, Ms. Silk mentioned that Mr. Holbrook's estate will likely be insolvent given the claims against it. Although the Equity Petitioners have an attachment on real estate currently held by Ms. Christo, but previously held by the Survivor Trust, of \$1,000,000, see Equity Matter Index ##2, 11, 12, the values of the underlying properties are unclear, and litigation of the issues at hand is likely to be lengthy and expensive. Accordingly, the Court encourages the parties to consider scheduling mediation with a Trust Docket mediator and attempt a non-judicial resolution of their disputes. The parties are encouraged to confer and contact Denise Pearl, Court

Assistant Specially Assigned to the Trust Docket as soon as practicable should they agree to arrange for mediation.

SO ORDERED

Dated: 10/31/2018

  
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David D. King, Judge