UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

KATHARINE UMSTED, ALEXANDRA STODGHILL, and TRUXTON UMSTED, Plaintiffs,	:	
v.	:	CA 03-219S
LINDA J. UMSTED and QUENTIN ANTHONY, in their capacities as Co-Executors of the ESTATE OF SCOTT UMSTED, JR., and as Trustees of the SCOTT UMSTED, JR. FAMILY TRUST and as Trustees of the SCOTT UMSTED, JR. MARITAL TRUST, Defendants.	:	

REPORT AND RECOMMENDATION

David L. Martin, United States Magistrate Judge

Before the court are two motions for summary judgment filed by Defendants Linda J. Umsted and Quentin Anthony in their capacities as co-executors of the estate of Scott Umsted, Jr., and as trustees of the Scott Umsted, Jr. Family Trust and as trustees of the Scott Umsted, Jr. Marital Trust ("Defendants").[1]

[1] The motions for summary judgment reflect that they are filed by the "Estate of Scott Umsted, Jr." Defendant's [sic] Motion for Summary Judgment (Document #18) filed on November 24, 2003 ("First Motion for Summary Judgment"); Defendant's [sic] Motion for Summary Judgment (Document #13) filed on November 25, 2003 ("Second Motion for Summary Judgment"). "The personal estate of a decedent is not a legal entity." Estate of Lemaster v. Hackley, 750 S.W.2d 692, 694 (Mo. Ct. App. 1988). "[T]he estate of a decedent ... can only act by and through a representative of the estate ...." 34 C.J.S. *Executors and Administrators* § 706 (2004); see also Aufenkamp v. Grabill, 112 S.W.3d 455, 460 (Mo. Ct. App. 2003)(same); cf. Procaccianti v. Procaccianti, 69 A.2d 635, 640 (R.I. 1949)(noting that "it would be better pleading to allege that the complainant sues in his capacity as the administrator de bonis non"); Tucker v. Whaley, 1877 WL 7565, at *2 (R.I. 1877)("the estate can only be charged through the

See Defendant's [sic] Motion for Summary Judgment (Document #18) filed November 24, 2003 ("First Motion for Summary Judgment"); Defendant's [sic] Motion for Summary Judgment (Document #13) filed November 25, 2003 ("Second Motion for Summary Judgment"). The motions have been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and D.R.I. Local R. 32(a). A hearing was conducted on April 27, 2004. After reviewing the memoranda and exhibits submitted and performing independent research, I recommend that the Second Motion for Summary Judgment be granted and that First Motion for Summary Judgment be ruled moot.

Overview

Plaintiffs are the grandchildren of Margaret Beale Umsted ("Margaret"), and they are citizens of states other than Rhode Island. In their Complaint Plaintiffs allege that their late uncle, Scott Umsted, Jr. ("Scott Jr."), who resided in South Kingstown, Rhode Island, tortiously interfered with their expectancy of inheritance in certain real property located in Jamestown, Rhode Island (Count One). They contend that Scott Jr. exercised undue influence over Margaret and in 1983 caused her to convey the real property without adequate consideration to herself and Scott Jr. as joint tenants (Count Two). As a result of this deed, when Margaret died in 1999 the property was not part of her residuary estate in which Plaintiffs were entitled to a fifty percent share.

In this action, Plaintiffs are suing the co-executors of their uncle's estate, and they seek imposition of a constructive

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administrator"). Accordingly, this court treats the motions for summary judgment as being filed by Defendants Linda J. Umsted and Quentin Anthony in their capacity as co-executors of the estate of Scott Umsted, Jr., and as trustees of the Scott Umsted, Jr. Family Trust and as trustees of the Scott Umsted, Jr. Marital Trust ("Defendants").

trust on the real property and money damages. The court concludes that Rhode Island law would not recognize a cause of action for tortious interference with expectancy of inheritance in the circumstances of this case and that Plaintiffs' claim of undue influence, if it exists at all, is barred by the statute of limitations. Therefore, summary judgment should be granted in Defendants' favor.

Facts and Travel

Scott Umsted, Sr. ("Scott Sr."), and Margaret, residents of Jamestown, Rhode Island, had two children, Scott Jr. and Truxton Umsted. See Complaint ¶ 8; see also Plaintiffs' Memorandum in Support of Their Opposition to Defendants' Motion for Summary Judgment ("Plaintiffs' Mem."), Exhibit ("Ex.") A ¶¶ 5, 11, 33-34, 36. Truxton Umsted predeceased his parents, leaving three children, Plaintiffs Katharine Umsted, Alexandra Stodghill, and Truxton Umsted, Jr. ("Plaintiffs" or the "Grandchildren"). See id. ¶ 9. Scott Sr. died in 1979. See id. ¶ 10. Scott Jr. served as executor of his father's estate from 1979 until Scott Jr.'s death in October of 2000. See id.

Prior to June 15, 1983, Margaret held a legal interest in certain real property in Jamestown, consisting of two parcels, designated as Jamestown Tax Assessor's Plat 9, Lots 288 and 289 (the "Property"). See Complaint ¶ 13. Margaret held a one hundred percent interest in Lot 288 and a one quarter interest in Lot 289. See id. Plaintiffs allege that Margaret intended to leave half of her interest in the Property to them (the Grandchildren) and the other half to her son, Scott Jr. See id. ¶ 14.

On June 15, 1983, Margaret conveyed all of her interest in the Property to herself and Scott Jr. as joint tenants. See id. ¶ 15. Plaintiffs claim that Margaret was dependent upon Scott Jr. for advice and direction, see id. ¶ 29, and that a close,

confidential relationship existed between them, see id. ¶ 25. Additionally, Plaintiffs claim that a fiduciary relationship existed between Scott Jr. and his mother because he was a trustee and executor under Scott Sr.'s will.[2] See id. ¶ 26. Plaintiffs allege that Scott Jr. took undue advantage of the trust and confidence which his mother placed in him, see id. ¶ 30, tortiously inducing her to make this inter vivos conveyance which reduced the size of her estate, see id. ¶ 22, and interfered with Plaintiffs' reasonable expectation of inheriting an interest in the Property, see id. ¶¶ 21, 31. Plaintiffs charge that the conveyance was the result of undue influence. See id. ¶ 31. Defendants do not dispute that if Margaret had owned the Property at the time of her death, it would have passed pursuant to the residue clause of her will which left everything equally to Plaintiffs and Scott Jr. See Affidavit Motion in Support of Motion for Summary Judgment (Document #15) ("Second Umsted Aff.")[3] ¶ 7; see also Rule 12.1 - Statement of Undisputed Facts

[2] Under the will of Scott Umsted, Sr. ("Scott Sr."), the residuary of his estate was to pass to Rhode Island Hospital Trust and Scott Umsted, Jr. ("Scott Jr."), as trustees for the benefit of Margaret Beale Umsted ("Margaret") until her death and, thereafter, to Scott Jr. and Katharine Umsted, Alexandra Stodghill, and Truxton Umsted, Jr. ("Plaintiffs" or the "Grandchildren"), equally (the "Testamentary Trust"). See Complaint ¶ 11. Scott Jr. allegedly failed to establish the Testamentary Trust and notify his co-trustee, Rhode Island Hospital Trust of the appointment. See id. From the time that the Estate of Scott Sr. was filed in the Probate Court of the Town of Jamestown until about May, 1991, Scott Jr. served as Jamestown's probate judge. See id. ¶ 12.

[3] Defendants filed an affidavit signed by Linda Umsted ("Linda") in support of each motion for summary judgment. See Affidavit in Support of Motion for Summary Judgment (Document #20) filed on November 24, 2003 ("First Umsted Aff."); Affidavit Motion in Support of Motion for Summary Judgment (Document #15) filed on November 25, 2003 ("Second Umsted Aff.").

(Document #14) ("Second SUF")[4] ¶ 7.

Margaret died on March 17, 1999. See Complaint ¶ 16. Scott Jr. served as executor of Margaret's estate from March 17, 1999, until his death on October 9, 2000. See Plaintiffs' Rule 12.1 Statement (Document #22) ("Plaintiffs' Statement") ¶ 9. Plaintiffs learned in June or July of 1999 of the 1983 deed which had made Scott Jr. a joint tenant with Margaret in the Property. See Plaintiffs' Mem. at 7, 8. Prior to that time, Plaintiffs had always believed that they would collectively receive a one-half interest in the Property. See id. at 6-7 (citing id., Ex. D (Deposition of Truxton Umsted, Jr.) at 31-32.

On April 10, 2001, Attorney Richard Boren ("Mr. Boren") was appointed administrator d.b.n.c.t.a. of Margaret's estate. See Second Umsted Aff. ¶ 4. Shortly thereafter, counsel for Plaintiffs met with Mr. Boren and "suggested that Mr. Boren take action to bring the ... Property back into the Estate." Plaintiffs' Statement ¶ 22 (citing Plaintiff's Mem., Ex. E (Deposition of Mr. Boren) at 34-38). However, Plaintiffs did not make a written demand upon Mr. Boren to commence such an action. See Second Umsted Aff. ¶ 6; see also R.I. Gen. Laws § 33-18-17 (1995 Reenactment).

Defendants Linda J. Umsted[5] and Quentin Anthony[6] were appointed co-executors of Scott Jr.'s estate on or about October 25, 2000. See Plaintiffs' Statement ¶ 19. Although Defendants were aware that Plaintiffs had concerns about the manner in which

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[4] Defendants filed a Rule 12.1 Statement of Undisputed Facts in support of each motion for summary judgment. See Rule 12.1 - Statement of Undisputed Facts (Document #19) filed on November 24, 2003 ("First SUF"); Rule 12.1 - Statement of Undisputed Facts (Document #14) filed on November 26, 2003 ("Second SUF").

[5] Linda J. Umsted is the widow of Scott Jr. See First SUF ¶ 2.

[6] Quentin Anthony is an attorney at law and represents Defendants in this action. See Motions for Summary Judgment.

Scott Jr. had performed his duties as executor of Scott Sr.'s and Margaret's estates, they did not give notice to Plaintiffs of the commencement of the administration of Scott Jr.'s estate as required by R.I. Gen. Laws § 33-11-5.1. See Plaintiffs' Statement ¶ 20; see also Letter from Jackvony to Martin, M.J., of 11-10-04 (replying to letter from Martin, M.J., to Jackvony of 11-5-04). On or about April 5, 2002, Defendants conveyed by executor's deeds, pursuant to the terms of Scott Jr.'s Will, a 72.86% interest in the Property to themselves as Trustees of the Scott Umsted Jr. Family Trust and a 27.14% interest in the Property to themselves as Trustees of the Scott Umsted Jr. Marital Trust. See Complaint ¶¶ 17-18; see also Plaintiffs' Statement ¶ 23.

Plaintiffs filed the instant Complaint on June 3, 2003. They seek to have a constructive trust imposed on the Property for their benefit and to be awarded money damages and attorneys' fees. See Complaint, Prayer for Relief. On June 30, 2003, Defendants answered the Complaint. Defendants filed their First Motion for Summary Judgment on November 24, 2003, and their Second Motion for Summary Judgment on November 25, 2003. Plaintiffs' Objection to Defendants' Motion for Summary Judgment, responding to both motions, was filed on December 15, 2003. Defendants on January 9, 2004, filed a reply memorandum. The court conducted a hearing on the motions for summary judgment on April 27, 2004. Thereafter, the matter was taken under advisement.

Law

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kearney v. Town

of Wareham, 316 F.3d 18, 21 (1st Cir. 2002)(quoting Fed. R. Civ. P. 56(c)). "'A dispute is genuine if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party. A fact is material if it carries with it the potential to affect the outcome of the suit under the applicable law.'" Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000)(quoting Sánchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996)).

In ruling on a motion for summary judgment, the court must examine the record evidence "in the light most favorable to, and drawing all reasonable inferences in favor of, the nonmoving party." Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1st Cir. 2000)(citing Mulero-Rodriguez v. Ponte, Inc., 98 F.3d 670, 672 (1st Cir. 1996)). "[W]hen the facts support plausible but conflicting inferences on a pivotal issue in the case, the judge may not choose between those inferences at the summary judgment stage." Coyne v. Taber Partners I, 53 F.3d 454, 460 (1st Cir. 1995). Furthermore, "[s]ummary judgment is not appropriate merely because the facts offered by the moving party seem more plausible, or because the opponent is unlikely to prevail at trial. If the evidence presented is subject to conflicting interpretations, or reasonable men might differ as to its significance, summary judgment is improper." Gannon v. Narragansett Elec. Co., 777 F. Supp. 167, 169 (D.R.I. 1991)(citation and internal quotation marks omitted). However, the non-moving party may not rest merely upon the allegations or denials in its pleading, but must set forth specific facts showing that a genuine issue of material fact exists as to each issue upon which it would bear the ultimate burden of proof at trial. See Santiago-Ramos, 217 F.3d at 53 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

In the present matter, this court, sitting in diversity jurisdiction, must apply the law of Rhode Island, the forum state. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938); see also Lexington Ins. Co. v. Gen. Accident Ins. Co. of Am., 338 F.3d 42, 46 (1st Cir. 2003) ("It is a black-letter rule that state substantive law supplies the rules of decision for a federal court sitting in diversity jurisdiction.")(citing Erie, 304 U.S. at 78).

Discussion

I. Count One

A. Does Rhode Island Recognize the Cause of Action?

An initial matter, the court must determine whether Rhode Island recognizes a cause of action for tortious interference with expectancy of inheritance (Count One) in the circumstances presented by the instant case. See 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, 84 n.15 (2003)(reporting that "[t]he tort is currently recognized in at most twenty-four states," that "ten states have either explicitly declined to recognize [it], or have declined to decide whether to recognize it," and that Rhode Island is among sixteen states that "have no reported cases addressing or even mentioning the tort"); see also Devlin v. United States, 352 F.3d 525, 540 (2nd Cir. 2003) (citing Klein article). If the tort is not cognizable under state law, then Defendants are entitled to summary judgment as to Count One of the Complaint.

The court is aware that "Rule 6 of the Rules of the Supreme Court of Rhode Island provides for certification of questions of Rhode Island law which may be determinative of a cause of action and as to which there is no controlling precedent." 56 Assocs.

v. Frieband, 89 F.Supp.2d 189, 191 (D.R.I. 2000). However, the United States Court of Appeals for the First Circuit has cautioned "that, although certification may be available, 'it is inappropriate to use such a procedure when the course state courts would take is reasonably clear.'" Id. (quoting Bi-Rite Enters. v. Bruce Miner Co., 757 F.2d 440, 443 n.22 (1st Cir. 1985)).

> The mere fact that the Rhode Island Supreme Court has not had occasion to address an issue does not, by itself, require certification. A "federal court may attempt to predict how [a] state's highest court would rule on [an] issue in a pending federal case." Lieberman-Sack v. HCHP-NE, 882 F.Supp. 249, 254 (D.R.I. 1995). Such predictions may be based upon existing state law or the "better reasoned authorities" from other jurisdictions. See id.

56 Assocs. v. Frieband, 89 F.Supp.2d at 191 (alterations in original).

In the absence of any reported Rhode Island case law or state statute which refers to the tort, this Court will examine "the 'better reasoned authorities' from other jurisdictions," id. (quoting Lieberman-Sack v. HCHP-NE, 882 F.Supp. at 254 (quoting Ryan v. Royal Ins. Co. of Am., 916 F.2d 731, 739 (1st Cir. 1990))), to determine whether the course that the Rhode Island Supreme Court would follow here regarding the cause of action "is reasonably clear," Bi-Rite Enters. v. Bruce Miner Co., 757 F.2d at 443 n.3.

A review of the opinions of those courts which have considered the tort indicates that generally it is not recognized when the plaintiff has an alternative remedy for the alleged wrong. See Jackson v. Kelly, 44 S.W.3d 328, 332 (Ark. 2001) (citing Nita Ledford, Note, Intentional Interference with Inheritance, 30 Real Prop. Prob. & Tr. J. 325, 340-41 (1995) ("[M]ost jurisdictions prohibit a plaintiff from pursuing the

tort action unless a probate action is either unavailable or inadequate.")); Fell v. Rambo, 36 S.W.3d 837, 849 (Tenn. Ct. App. 2000)(noting that one of the reasons expressed by states not adopting the tort is that "existing law already provided the plaintiff with an adequate remedy"). "Even among those jurisdiction[s] that have recognized a cause of action for intentional interference with inheritance, most courts hold that the plaintiff, in order to pursue the cause of action, must show that there are no adequate alternative remedies to the tort action." Jackson v. Kelly, 44 S.W.3d at 332; accord Wilson v. Fritschy, 55 P.3d 997, 1001 (N.M. Ct. App. 2002)(holding that "as a general rule ... the tort does not obtain when an adequate remedy exists in probate"); Graham v. Manche, 974 S.W.2d 580, 584 (Mo. Ct. App. 1998)("It is generally accepted that the claim will survive only when the plaintiff attempts to seek relief in probate court or has no adequate remedy in the probate court.")(citing Reaves, Tortious Interference with an Expected Gift or Inheritance, 47 J. Mo. Bar 563, 565 (Oct.-Nov.1991); see also Rienhardt v. Kelly, 164 F.3d 1296, 1301 (10th Cir. 1999) (noting that, in the case where New Mexico recognized the tort, a challenge to inter vivos transfers could not be brought in probate proceedings);[7] Moore v. Graybeal, 843 F.2d 706, 711 (3rd

[7] The federal court opinion in Rienhardt appears to be in line with the weight of the case law emerging from state appellate courts. **Of those states that have considered the tort of intentional interference with inheritance, most have held that claims in tort may only be brought when there is no adequate remedy in probate.**

Wilson v. Fritschy, 55 P.3d 997, 1001 (N.M. Ct. App. 2002)(bold added); see also James A. Fassold, Tortious Interference with Expectancy of Inheritance: New Tort, New Traps, 36 Ariz. Attorney 28 (2000)("Most states that have considered the issue have held that a claim for tortious interference with expectancy of inheritance may only be brought where conventional probate relief would be inadequate.").

Cir. 1988)(refusing to allow a tortious interference claim to be pursued "where ... there was adequate relief available in a statutory proceeding")(construing Delaware law); Labonte v. Giordano, 687 N.E.2d 1253, 1256 (Mass. 1997)(declining to recognize a new cause of action where "[t]here are sufficient remedies available under current law"); Claveloux v. Bacotti, 778 So.2d 399, 400 (Fla. Dist. Ct. App. 2001)(affirming dismissal of suit for intentional interference with an expectancy of inheritance and holding that exceptions to rule favoring resolutions of such disputes in probate proceedings "are limited to relatively rare circumstances in which post-death remedies are virtually certain to be inadequate"); cf. Golden v. Golden, 382 F.3d 348, 365-66 (3rd Cir. 2004)(explaining dismissal in prior case of "claim for tortious interference with inheritance because such an action would be 'so inconsistent with the Delaware statutory plan for exclusive review of probate proceedings that allowing it would subvert the probate law'")(quoting Moore v. Graybeal, 843 F.2d at 710); Rienhardt v. Kelly, 164 F.3d 1296, 1300 (10th Cir. 1999)(explaining that in prior case the court "accepted federal jurisdiction over the challenged inter vivos transfers of the decedents's property because (1) a will contest was not an adequate remedy for property that was transferred before the testator died and thus was not part of the testator's estate and (2) Kansas law gave courts of general jurisdiction power to hear actions to bring property into an estate")(citing McKibben v. Chubb, 840 F.2d 1525, 1529 (10th Cir. 1988)).

The rationale for not allowing an action for tortious interference with an expectancy where an alternative remedy exists is generally expressed as being rooted in policy considerations intended to limit the time within which the validity of a will may be questioned, to prevent collateral attacks on probate decrees, and to create stability in the

administration of estates. See Wilson v. Fritschy, 55 P.3d 997, 1001-02 (N.M. Ct. App. 2002); see also Carlton v. Carlton, 575 So.2d 239, 242 (Fla. Dist. Ct. App. 1991)("The law universally favors promptness in closing estates.")(quoting Fowler v. Hartridge, 24 So.2d 306 (Fla. 1945)). In the instant case, it is the last consideration, stability in the administration of estates, which is most applicable.

Rhode Island's probate statutory scheme is comprehensive in nature, see Lind v. McSoley, 419 A.2d 247, 249 (R.I. 1980), and is intended to secure the prompt settlement of estates and the quieting of titles derived from persons who are dead, see Thompson v. Hoxsie, 55 A. 930, 931 (R.I. 1903)(noting that the special statutes of limitations for probate proceedings are "wholesome provision[s], designed to produce a speedy settlement of estates, and **the repose of titles derived under persons who are dead**")(bold added); see also In re Estate of Santoro, 572 A.2d 298, 301 (R.I. 1990)(stating that the purpose of the nonclaim probate statutes[8] is "the expeditious resolution of probate proceedings"); Gilbert v. Hayward, 92 A. 625, 628 (R.I. 1914)("taking into consideration **the whole statutory schemes for the early settlement of estates of deceased persons in courts of probate**, the reasonable and only conclusion is that *all* claims against such estates are required to be filed in the office the clerk of said court")(bold added); MacNeill v. Gallagher, 53 A. 630, 631 (R.I. 1902)(noting prior holding "that the special

[8] The term "nonclaim" statutes refers to the special statutes of limitations which limit the time within which an action can be brought against a decedent's personal representative in his or her official capacity. See Thompson v. Hoxie, 55 A. 930, 931 (R.I. 1903)("The authorities ... are entirely uniform in holding that the special statute of limitations, otherwise termed the statute of nonclaim, which limits the time within which an action can be brought against [an administrator or executor] in his official capacity, is imperative, and cannot be waived.")(internal quotation marks omitted).

statute of limitations in decedents' estates superseded the general statute"); cf. Heflin v. Koszela, 774 A.2d 25, 31 (R.I. 2001)(holding that "claims arising in tort or for unliquidated damages ... must be filed against the estate of a deceased person in the probate court").

The Rhode Island Probate Code provides the type of alternative remedy which has caused courts in other jurisdictions to decline to recognize the tort. R.I. Gen. Laws § 33-18-17[9] (1995 Reenactment) offers an avenue of redress for persons who believe that there has been tortious interference with their expectancy of inheritance. They may request the administrator or executor to commence an action to recover any property which they have reason to believe should be recovered for the benefit of the estate. See R.I. Gen. Laws § 33-18-17. If the administrator or executor fails to bring such an action, the aggrieved persons may institute proceedings themselves provided that more than fifteen

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[9] R.I. Gen. Laws 33-18-17 provides:

> **If an administrator**, executor, or guardian **shall be requested by any person legally interested in the estate of a deceased person**, or person under guardianship, **to commence an action or proceeding to recover any property, personal or real, which the legally interested person may have reason to believe should be recovered for the benefit of the estate, and if the administrator**, executor, or guardian **shall**, for fifteen (15) days after written notice so to do, either personally delivered to himself or herself or his or her agent, or left at the last and usual place of abode of himself or herself or his or her agent, **refuse**, neglect or for any reason be incompetent, **to commence the action or proceeding, the legally interested person may institute proceedings in the name of the estate of the deceased person**, or person under guardianship, in the same manner and to the same extent as the administrator, executor, or guardian may do in the case of personal property, and **in the case of real estate in the same manner as a guardian, devisee, or heir at law may do, to recover the property.**

R.I. Gen. Laws § 33-18-17 (1995 Reenactment).

days have elapsed since written notice requesting the commencement of such an action was delivered to the administrator or executor. See id.

In the instant case, Plaintiffs could have made a written demand pursuant to this statute upon Scott Jr., the executor of Margaret's estate, to commence an action to recover the Property. See id. If he had neglected, refused, or been incompetent to do so, they could have commenced the action themselves. See id. After Scott Jr. died on October 9, 2000, Plaintiffs also could have made a like demand upon Mr. Boren, the administrator d.b.n.c.t.a. of Margaret's estate, following his appointment on April 10, 2001, see id., and filed an action themselves if he failed to do so.[10]

Because the General Assembly has provided in § 33-18-17 a specific remedy in the probate code for the wrong allegedly suffered by Plaintiffs, there appears to be no need to recognize a new cause of action for tortious interference with expectancy of inheritance. Cf. All Children's Hosp., Inc. v. Owens, 754 So.2d 802, 806 (Fla. Dist. Ct. App. 2000)("The personal representative has specific statutory authority to recover estate assets and determine title to them. We see little value in allowing the residual beneficiaries to engage in personal lawsuits to place constructive trusts upon assets that otherwise could be gathered by the personal representative and included within the inventory of the estate[11].")(citation omitted).[12]

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[10] Although Plaintiff's attorney "suggested" that Mr. Boren, the Administrator d.b.n.c.t.a., take action to bring the Property back into the Estate, see Plaintiffs' Rule 12.1 Statement (Document #22) ("Plaintiffs' Statement") ¶ 22, Plaintiffs did not make a written demand on Mr. Boren pursuant to R.I. Gen. Laws § 33-18-17 to commence an action to recover the Property, see Second SUF ¶ 6.

[11] Plaintiffs note that the Property was not included on the inventory filed in probate court for the Estate of Scott Jr. See Plaintiffs' Memorandum in Support of Their Opposition to Defendants'

Allowing such a cause of action here would undermine the twin objectives of Rhode Island probate scheme of prompt settlement of estates and quieting titles derived from deceased persons. See Gilbert v. Hayward, 92 A. 625, 628 (R.I. 1914); Thompson v. Hoxsie, 55 A. 930, 931 (R.I. 1903); cf. Holt v. First Nat'l Bank of Mobile, 418 So.2d 77, 80 (Ala. 1982)(refusing to recognize cause of action for tortious interference with expectancy of inheritance where the alleged promise was made more than fifteen years before the original complaint, the alleged tortfeasor was dead, and no written evidence of either the fraud or the intent was alleged). Recognition of the tort would also be contrary to the Rhode Island Supreme Court's long standing holding "that the creation of new causes of action is a legislative function." Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996)(citing Ferreira v. Strack, 652 A.2d 965, 968 (R.I. 1995)(citing Kalian v. People Acting Through Community Effort, Inc. (PACE), 408 A.2d 608, 609 (R.I. 1979))); see also Levasseur v. Knights of Columbus, 188 A.2d 469, 471 (R.I. 1963)(holding that the creation of a new cause of action is not a proper function of the judicial

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Motion for Summary Judgment ("Plaintiffs' Mem.") at 6. They argue that in Rhode Island real property is not an asset of the estate of a decedent. See id. at 5 (citing DiCristofaro v. Beaudry, 320 A.2d 597, 601 (R.I. 1974)("Title to real property vests immediately upon a testator's death in the devisees.")). However, R.I. Gen. Laws § 33-18-17 specifically authorizes an administrator, executor, or other legally interested person to sue to recover real property for the benefit of the estate. Thus, this court does not find the fact that the Property was not in listed on the inventory of Scott Jr.'s estate to be a reason for concluding that Plaintiffs could not have availed themselves of the remedy provided in § 33-18-17 and sued to recover the Property for the benefit of Margaret's estate.

[12] The property on which the plaintiffs in All Children's Hospital sought to have a constructive trust imposed appears to have included real estate as well as personalty. See All Children's Hosp., Inc. v. Owens, 754 So.2d 802, 803 (Fla. Dist. Ct. App. 2000).

department).

Moreover, it appears to this court that by enacting § 33-18-17, which authorizes the bringing of an action to recover not only personal but also real property of a decedent, the General Assembly contemplated the circumstances presented by the instant case and provided a remedy by which the alleged wrong could be addressed and resolved promptly. There is no need to create a new cause of action when the existing remedy is adequate.

It is true that an action pursuant to § 33-18-17 to recover real estate would not appear to allow for the recovery of money damages, and Plaintiffs have requested such damages. See Complaint, Prayer for Relief. However, Plaintiffs' request for monetary damages is clearly pro forma. Plaintiffs repeatedly state in their memorandum that "[t]his action is not a claim against either the estate of Scott Jr. or against the executors of the estate of Scot[t] Jr. for their actions or inactions in the administration of the estate of Scott Jr." Plaintiffs' Mem. at 4-5; id. at 5 ("[T]his action is not against the estate of Scott Jr. and no claim was required to be filed in the South Kingstown Probate Court."); id. at 9 (same).

Given that Plaintiffs avow that the action is not against the tortfeasor (Scott Jr.) or his estate, two obvious questions arise about their request for money damages. Who (or what entity) would pay Plaintiffs the monetary damages which they seek? What would be the legal basis for ordering that person (or entity) to pay such damages? The lack of an answer to either of these question is further evidence of the pro forma nature of Plaintiffs' request for monetary damages. Therefore, the fact that Plaintiffs have made a pro forma request for monetary damages does not prevent this court from finding that § 33-18-17 provides an alternative remedy to an action for tortious

interference with expectancy of inheritance.[13]

Based on "the 'better reasoned authorities' from other jurisdictions," 56 Assocs. v. Frieband, 89 F.Supp.2d 189, 191 (D.R.I. 2000)(citation omitted), and existing state law, see id., I find that Rhode Island would not recognize a cause of action for tortious interference with expectancy of inheritance in the circumstances here presented. This finding is based on the fact that an adequate remedy exists in the probate code, namely § 33-18-17, for the type of wrong allegedly suffered by Plaintiffs. Consequently, there is no need to recognize a new cause of action.

B. Conclusion Re Count One

For the reasons stated above, I find that Rhode Island would not recognize a cause of action for tortious interference with expectancy of inheritance in the circumstances presented by the instant case. Accordingly, Defendants' motion for summary judgment should be granted as to Count One, and I so recommend.

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[13] It is clear that a claim for monetary damages based on Scott Jr.'s alleged exercise of undue influence upon Margaret would require Plaintiffs to comply with R.I. Gen. Laws § 33-11-4:

> **All persons having claims**, including pending suits, preferred claims, and claims of the executor or administrator, **against the estate of a deceased person shall file statements of their claims in the office of the clerk of the probate court** in such form which adequately sets forth the nature and approximate amount (if known) of the claim, and the name and address of the claimant and of his or her attorney, if any. Each statement of claims, other than that filed by an executor or administrator, shall contain an affidavit that a copy of the statement was transmitted by hand delivery, or forwarded to the executor or administrator, or his or her attorney of record by registered or certified mail, return receipt requested.

R.I. Gen. Laws § 33-11-4 (bold added); see also Heflin v. Koszela, 774 A.2d 25, 31 (R.I. 2001)("[C]laims arising in tort or for unliquidated damages [are] not contingent claims and must be filed against the estate of a deceased person in the probate court.")(second alteration in original).

II. Count Two (Undue Influence)

A. Nature of Claim

There is disagreement among courts regarding the nature of a claim for undue influence. Some courts consider it to be a tort, see Arena v. McShane, No. Civ.A. 02-7639, 2004 WL 1925048, at *1 (E.D. Pa., Aug. 30, 2004)(referring to "the torts of intentional interference with inheritance and undue influence"); In re Niles, 823 A.2d 1, 9 (N.J. 2003)("Undue influence is a pernicious tort that has been referred to as a species of fraud.")(internal quotation marks omitted). Other courts hold that "[a] claim for undue influence sounds in tort." Calautti v. Pasquarello, No. CA962445E, 2000 WL 1273851, at *5 (Mass. Super. Ct. May 24, 2000); accord D'Agostino v. D'Addio, 504 A.2d 528, 528 (Conn. App. Ct. 1986)(holding that action to set aside conveyance of real estate made to defendant "sounded in tort."); Falby v. New England Forestry Found., No. 011793C, 2003 WL 734453, at *2, (Mass. Super. Ct. Feb. 6, 2003)("There is no doubt that claims alleging fraudulent misrepresentation and undue influence both sound in tort.").

Taking an opposite view, some courts have firmly rejected the proposition that undue influence is a tort. See Bragdon v. Twenty-Five Twelve Assocs. Ltd. P'ship, 856 A.2d 1165, 1173 (D.C. 2004)("there is no tort of undue influence, and there is no right to damages, as distinct from restitution, because of such influence")(quoting 2 Dobbs, Law of Remedies § 10.3, at 658 (2d ed. 1993)); Rich v. Fuller, 666 A.2d 71, 76 (Me. 1995)("Undue influence is not an intentional tort ... but rather a set of circumstances that gives rise to the equitable remedy of rescission.")(citing Restatement (Second) of Contracts, ch. 7, Topic 2, introductory note at 474 (1981)("Since duress and undue influence, unlike deceit, are not generally of themselves actionable torts, the victim of duress or undue influence is

usually limited to avoidance and does not have an affirmative action for damages.")); Fell v. Rambo, 36 S.W.3d 837, 849 n.18 (Tenn. Ct. App. 2001)("undue influence is not a tort").

This court finds more persuasive the opinions which hold that undue influence is not a tort, but rather a set of circumstances which gives rise to an equitable remedy, such as rescission, see Rich v. Fuller, 666 A.2d 71, 76 (Me. 1995), restitution, see Bragdon v. Twenty-Five Twelve Assocs. Ltd. P'ship, 856 A.2d 1165, 1173 (D.C. 2004), or, as in the instant case, imposition of a constructive trust.[14] Because the court has concluded that Rhode Island law would not recognize Plaintiffs' claim for tortious interference with expectancy of inheritance, see Discussion, Count One, supra at 13-17, the question arises whether Plaintiffs may still prosecute an action for equitable relief. In other words, in the absence of a valid tort action or other legal claim against these Defendants, may Plaintiffs prosecute an action against them for equitable relief? Cf. Holt v. First Nat'l Bank of Mobile, 418 So.2d 77, 81 (Ala.

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[14] "Generally speaking, a constructive trust is an equitable remedy which compels one who unfairly holds a property interest to convey that interest to another to whom it justly belongs." Cook v. Comm'r of Internal Revenue, 80 T.C. 512, 523 (T.C. 1983)(citing 5 A. Scott, Trusts 410 (3d ed. 1967)); see also Spagnoglia v. Monasky, 660 N.W.2d 223, 229 (N.D. 2003)("A constructive trust is an equitable remedy to compel a person who unfairly holds a property interest to convey it to the rightful owner."); Renaud v. Ewart, 712 A.2d 884, 885 (R.I. 1998)("The underlying principle of a constructive trust is the equitable prevention of unjust enrichment of one party at the expense of another in situations in which legal title to property was obtained by fraud or in violation of a fiduciary or confidential relationship.").

A request for imposition of a constructive trust is not a cause of action. See Metalmark Northwest, L.L.C. v. Stewart, No. 04-686-KI, 2004 WL 1970146, at *4 (D. Or. Sept. 2, 2004)(holding that claim for constructive trust is a remedy, not a cause of action); Lerario v. Provident Life & Accident Ins. Co., No. CIV.A. 96-2100, 1996 WL 532491, at *4 (E.D. Pa. Sept. 20, 1996)("[I]mposition of a constructive trust is not a cause of action but rather an equitable remedy that is enforced by a suit in equity.").

1982)(holding that "counts sounding in fraud and deceit are simply restatements of the primary count" of tortious interference with expectancy of inheritance). For purposes of this Report and Recommendation the court will assume that the answer to this question is yes, although the court acknowledges that it has not found authority either way.

B. To Whom Does the Claim of Undue Influence Belong?

At the hearing on the instant motions, counsel for Plaintiffs acknowledged that § 33-18-17 allowed any legally interested person to bring an action to recover real estate if the executor or administrator of an estate did not after being requested to do so. However, counsel for Plaintiffs maintained that the statute also recognized that Plaintiffs as "devisees" had a right to bring an action on behalf of themselves and not the estate to recover real property.[15] See Tape of 4/27/04 hearing. Although counsel's statement was directed to the entire action and not just to Count Two, the court here focuses on the

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[15] At the April 26, 2004, hearing, counsel for Plaintiffs stated:

> Rhode Island General Laws 33-18-17, which is entitled "Action in name of estate prosecuted by interested parties," indeed does set out a procedure for someone who is an interested party to bring the action if in fact the executor of the estate will not. However, very important, last sentence, last phrase of that last sentence, says "and in the case of real estate in the same manner as a guardian, devisee, or heir at law may do to recover the property." So consistent with Rhode Island law that real estate is not an asset of the decedent's estate, **if** in fact there is a thought that **there has been some wrong doing with respect to real estate and the executor** under authority of the Rhode Island Probate Code **does not try to bring that back into the estate to remedy that wrong, the devisees on behalf of themselves, not the estate, bring the action, and that that's what we've done here,** uh, and we believe this action should go forward and should rise or fall on the basis of whether or not there was undue influence exercised on Margaret Umsted to transfer that property to her son Scott.

Tape of 4/27/04 hearing (bold added).

claim of undue influence and considers to whom that claim belongs.

Defendants argue that the claim of undue influence is actually Margaret's cause of action as she was the person upon whom the undue influence was exercised. See Memorandum of Law in Support of Defendant's [sic] Motion for Summary Judgment filed November 25, 2003 ("Defendants' Second Mem.") at 2. The case of Dolan v. Dolan, 78 A.2d 367 (R.I. 1951), provides some support for Defendants' argument.

In Dolan, the complainant's elderly uncle conveyed his homestead in 1943 to himself and the complainant as joint tenants in partial payment for her years of devoted service in caring for him in his home. See id. at 368. Five years later, in 1948, the uncle quit-claimed his interest in the property to the respondent without consideration. See id. at 369. By doing so, the uncle allegedly "broke his promises to the complainant and deprived her of an undivided part of said property ...." Id. The complainant brought an action in equity, see id. at 368, and in her amended bill sought to have the 1948 deed declared null and void on the ground that the respondent had obtained it from her uncle by "undue influence, control and fraud," id. at 370. In dismissing the action, the Rhode Island Supreme Court held that:

> [T]his complainant has not established her right to maintain such a bill. **The particular wrong alleged in her amended bill has not been inflicted upon her, and she is not suing in any representative capacity.** Ordinarily a bill of the above nature is properly brought by the one imposed upon or by some duly appointed person acting in his behalf.

Dolan v. Dolan, 78 A.2d at 371 (bold added).

Thus, it appears that the Dolan court viewed the claim of undue influence as belonging to the uncle, see id., even though the conveyance deprived the complainant of an undivided part of the property, see Dolan v. Dolan, 78 A.2d at 369, and presumably

deprived her of the expectation that she would become owner of the entire property when the uncle died by virtue of the right of survivorship, see Williams v. Williams, 27 A.2d 176, 177 (R.I. 1942)(stating that the conveyance to a third person of a one half interest in real estate held by two joint tenants changes the estate to a tenancy in common).

Dolan, of course, can be distinguished from the instant case–most obviously in that the uncle was still alive at the time the action was brought, see Dolan, 78 A.2d at 368, and the complainant was not suing as a devisee but rather as a former joint tenant who had been reduced to tenant in common status, see id. at 369; see also Williams, 27 A.2d at 177. Yet, the fact the uncle was alive at the time the action was brought may not be as significant as it might first appear. The Dolan opinion strongly suggests that the uncle was incapable of bringing an action himself because of his advanced age and mental incapacity. See Dolan, 78 A.2d at 368, 369. Thus, the fact that the uncle was alive at the time the action was brought would not appear to be the basis for the Dolan court's conclusion that the complainant had no cause of action. Rather, the court's ruling appears to have been grounded on the fact that the uncle had been the victim of the alleged undue influence and not the complainant.

Based on Dolan, this court concludes that the claim for undue influence belongs to Margaret. If Plaintiffs have a claim for undue influence, it must be derived from the claim which Margaret had because she was "the one imposed upon," Dolan, 78 A.2d at 371. Consequently, I find that Plaintiffs' right to bring an action for undue influence can be no greater than the right which Margaret or the executor or administrator of her estate possessed.

C. Statute of Limitations

Plaintiffs contend that the earliest the statute of limitations began to run on their claim was in June or July of 1999, when they learned from their uncle, Scott Jr., of the 1983 deed which made him a joint tenant with Margaret in the Property.[16] See Plaintiffs' Mem. at 7, 8; see also id. at 6. Plaintiffs further argue that the ten year statute of limitations contained in R.I. Gen. Laws § 9-1-3 [17] (1997 Reenactment) is applicable to this action, see Plaintiffs' Mem. at 7, and that by filing their Complaint action on June 3, 2003, they were well within the time allowed, see id.

Defendants disagree. They argue that because the cause of action actually belonged to Margaret the three year statute contained in § 9-1-21[18] is applicable. See Defendants' Second

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[16] Plaintiffs also offer that they "first learned of the wrongful actions [by Scott Jr.] in the administration of their grandparents' estate in 2001 when they received the report of a Mr. Pirolli." Plaintiffs' Mem. at 8. While this additional knowledge may have increased Plaintiffs' animosity toward their late uncle and provided additional stimulus for the eventual filing of this action, the injury about which they complain was manifest in June or July of 1999 when they learned of the deed making their uncle a joint tenant with their grandmother. Plaintiffs knew as of that date they would not inherit the interest in the Property which they had expected.

[17] R.I. Gen. Laws § 9-1-13(a) provides:

> Except as otherwise specially provided, all civil actions shall be commenced within ten (10) years next after the cause of action shall accrue, and not after.

R.I. Gen. Laws. § 9-1-139(a) (1997 Reenactment).

[18] R.I. Gen. Laws § 9-1-21 states:

> Effect of death of party on statute of limitations. — **If any person, for** or against **whom any causes of action enumerated in this chapter accrue,** dies before the time limited for bringing action, or within sixty (60) days after the expiration of that time, and the cause of action survives, the action may be commenced by or against the executor or administrator of the deceased person, as the case may be, at any time not more than one year after the appointment of the executor or administrator of the person so dying, and not afterwards, if

Mem. at 2-3. As the action was not brought within three years of Margaret's death, Defendants maintain that it is time barred. See id. at 3.

The court concludes that Defendants are correct. Accepting Plaintiffs' argument would mean that Plaintiffs have a greater right (in terms of the applicable statute of limitations) to bring an action for undue influence than Margaret herself had, or her executor, administrator, or a person legally interested in her estate had (pursuant to § 33-18-17). It would also result in the incongruous situation that if Plaintiffs brought an action pursuant to § 33-18-17 to recover the Property for the benefit of the estate (which would directly benefit themselves), they would have to do so within (at the longest) the three year period allowed by § 9-1-21. However, if Plaintiffs brought the action on behalf of themselves (and not the estate), as Plaintiffs contend, they would have up to ten years to do so based on § 9-1-13(a). The court sees no basis for such a distinction.

Moreover, acceptance of Plaintiffs' argument regarding the applicable statute of limitations would undermine the objectives of Rhode Island's probate statutory scheme, i.e., the prompt settlement of estates and the quieting of titles derived from persons who are dead. See Thompson v. Hoxsie, 55 A. 930, 931 (R.I. 1903). Here Defendants signed the deeds to the Property in April of 2002 in their capacity as co-executors of Scott Jr.'s Will. See First SUF ¶ 9. If the ten year statute of limitations advocated by Plaintiffs were applicable, the present action would not be time barred until June of July of 2009. The potential for harm from such a situation is obvious. A grantee of a parcel of

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> barred by the provisions of this chapter; **provided, however, that any such action shall be brought within three (3) years after the death of the person and not after.**

R.I. Gen. Laws. § 9-1-13 (1997 Reenactment)(bold added).

real estate conveyed by executor's deed could find the validity of his or her title questioned years after the conveyance had been completed. Thus, the repose of titles derived from persons who are dead would be greatly diminished. Similarly, the executor who made the conveyance could find himself or herself named as a defendant in a lawsuit for an act performed as part of his or her duties relative to an estate long since closed.

C. Conclusion Re Count Two

In sum, this court concludes that if Plaintiffs have an action for equitable relief because of undue influence exercised by Scott Jr. upon Margaret that cause of action is derived from Margaret. Therefore, the action may only be brought within the same period that someone acting in a representative capacity for Margaret, such as her executor or administrator, could have brought the action. The longest that period could be pursuant to § 9-1-21 is within three years of Margaret's death on March 17, 1999. This action was not filed until June 3, 2003. Consequently, it is barred by the statute of limitations. See MacNeill v. Gallagher, 53 A. 630, 631 (R.I. 1902)(noting prior holding "that the special statute of limitations in decedents' estates superseded the general statute"). Accordingly, Defendants' motion for summary judgment should also be granted as to Count Two, and I so recommend.

Summary

In summary, as to Count One I find Plaintiffs' action is barred because in the circumstances of this case Rhode Island would not recognize a cause of action for tortious interference with expectancy of inheritance since an adequate remedy exists in R.I. Gen. Laws § 33-18-17. As to Count Two, if Plaintiffs have a claim of undue influence, it is barred by the statute of limitations because the cause of action is derived from Margaret, and § 9-1-21 provides that causes of action belonging to deceased

persons may not be brought more than three years after their death.

Conclusion

For the reasons stated above, I recommend that the Second Motion for Summary Judgment (Document #13) filed on November 25, 2003, be granted and that the First Motion for Summary Judgment (Document #18) filed on November 24, 2003, be ruled moot.[19] Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten (10) days of its receipt. See Fed. R. Civ. P. 72(b); D.R.I. Local R. 32. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

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David L. Martin
United States Magistrate Judge
November 30, 2004

[19] The reason the court recommends that the Second Motion for Summary Judgment be granted is that the grounds for the court's decision were raised by Defendants in the memorandum which they filed in support of that motion.