

## Weston Hurd Client News - February 2012

### Maestle and Carlin Persuade Appellate Court to Reverse \$1.5 Million Jury Verdict in a Case Alleging Intentional Interference with Inheritance Expectancy

Over the years, Freeman Swank, Sr. ("Sr."), and his wife Rheabelle, had drafted and executed several different Wills. Beginning in 1950, and repeated in 1968, 1982, 1995 and 1996, Freeman Swank, Sr. and Rheabelle created reciprocal Wills which distributed all of the property each individually owned, to the other upon either's death. The Wills further provided that if both husband and wife had died simultaneously, or upon the death of the survivor of the two of them, their estate would bequeath and devise to their three children equally. This is a typical, simple estate plan for a husband and wife with children.

However, in August, 1996, when Sr. and Rheabelle drafted new Wills which once again left each other as the primary beneficiary, the contingency clause in each Will was changed to completely disinherit two of their three children. Accordingly, the Wills provided that the parents' property would be devised solely to Freeman, Jr. should the parents die simultaneously or upon the survivor's death provided no new Will had been executed by that survivor. Upon discovery of the changes in their parents' Wills, the two newly disinherited children, Robert and Clark Swank, initiated litigation against their parents and brother as well as the latter's wife in 1997. The disinherited Swank brothers asserted various claims against their parents including claims that their other brother and his wife had intentionally interfered with their expectancy of inheritance from their parents and that Freeman, Jr. and his wife had caused their parents to alter the Wills through deception and undue influence. The brothers also claimed that they were in an oral partnership with their father relative to the parents' farm and their parents had been unjustly enriched through the disinherited sons' work on the farm.

The actions of the two disinherited brothers moved through the Richland County Common Pleas Court for over a decade including multiple appeals to the Fifth District on interlocutory orders. *See, Swank v. Estate of Freeman J. Swank*, 2005-Ohio-5524 (5th Dist.); *Swank v. Swank*, 2007-Ohio-6467 (5th Dist.); *Swank v. Swank*, 2008-Ohio-3997 (5th Dist.); and *Swank v. Swank*, 2010-Ohio-3105 (5th Dist.).

In addition, the Swank brothers instituted guardianship proceedings in the Richland County Probate Court to have their parents declared legally unfit to handle their own affairs. *See, Richland County Court of Common Plea, Probate Division, Case nos.: 98-2036 and 98-2037*. In those guardianship proceedings, the brothers, Robert and Clark Swank, claimed that their parents were incompetent and needed court intervention to protect them and their property, as well as to undo past transactions between the parents and their brother, Freeman, Jr. After investigation and a hearing, the Richland County Probate Court determined that no evidence existed that either parent was incompetent or otherwise in need of the court's intervention.

Unfortunately, that did not end the litigation which continued for several more years. After battling two of his sons for the last seven years of his life, Freeman Swank, Sr. died in 2004. Pursuant to Sr.'s last Will, as each previous Will had provided, he left his entire estate to his surviving wife, Rheabelle. Notably, there was no legal challenge to the validity of that Will or to Rheabelle's inheritance of Sr.'s entire estate. Notwithstanding the lack of any legal challenge to the validity of that Will, the Richland County Court continued to permit the brothers to advance their claims of undue influence and intentional interference with expectancy of inheritance. In 2010, a jury improperly awarded the disinherited brothers more than \$1.5 million in a judgment against their brother Freeman, Jr. and his wife. Weston Hurd partner, Angela Carlin, was retained by Mary Jane Swank, Sr.'s wife, to handle the appeal of this verdict to the Fifth District Court of Appeals and she worked with her fellow partner at Weston Hurd, Shawn Maestle, an experienced appellate attorney. On appeal, Carlin and Maestle argued that the litigation which began in 1997 was never properly before the court. Specifically, it was articulated that the Swank brothers never had constitutional standing to advance their claims because the disinherited brothers, as only contingent beneficiaries under prior Wills, lacked a legal interest in Freeman, Sr.'s estate since their mother, Rheabelle, as his survivor under the terms of those Wills, inherited his entire estate, thereby extinguishing their interest. *See, Swank v. Swank*, 2011-Ohio-6920, December 30, 2011 (5th Dist).

An intentional interference with an expectancy of inheritance claim, is a fairly new legal claim. In 1993, the Ohio Supreme Court first recognized that such claims could be advanced under Ohio law. *See, Firestone v. Galbreath* (1993), 67 Ohio St.3d 87. The required elements to advance the claim are: (1) the existence of a plaintiff's expectancy of inheritance; (2) a defendant's intentional interference with that expectancy; (3) a defendant's tortious conduct involving the interference, such as fraud, duress, or undue influence; (4) a reasonable certainty that the expectancy of inheritance would have been realized, but for a defendant's interference; and (5) damage resulting from the interference.

The fundamental and initial question any court must undertake before addressing the merits of any litigant's claim is, "Do the claimants have legal standing to advance their claims?". Indeed, Ohio's Constitution limits the jurisdiction of courts to cases and controversies. Ohio courts have interpreted this requirement to mandate that a party have "legal standing" which requires the party to establish that it has a personal stake in the outcome of the controversy and demonstrate an injury in fact which establishes that the party has suffered or will suffer a specific injury which is neither speculative nor hypothetical. The burden to prove that a party has legal standing is borne by the party seeking redress.

In this matter, the two Swank brothers were required to prove that they had met the constitutional prerequisites to enter the courthouse doors by establishing that they had a real and actual justiciable controversy to bring forth the litigation and utilize the judiciary. Maestle and Carlin argued that the initial inquiry should have occurred in 1997 when the court should have determined whether the two Swank brothers had the legal right to advance their claim for an intentional interference with the expectancy of inheritance.

Additionally, to advance an intentional interference claim, the two Swank brothers were required to show that "but for" the alleged interference by Freeman, Jr. and his wife, Mary Jane, they would have realized their expectancy and inheritance. However, as presented, neither Robert nor Clark Swank could ever satisfy these elements because their father's entire estate was always to be devised to their mother, Rheabelle, upon their father's death if she survived him.

Because Rheabelle survived Freeman, Sr.'s death, the Swank brothers alleged expectancy was never legitimized under any Will and they simply could never set forth any facts which gave them legal standing to advance their interference claim. Consequently, they lacked legal standing since they never had an actual real controversy recognizable or justiciable under Ohio law.

The Fifth District Court of Appeals agreed with this analysis, and in its opinion which closely resembles counsels' briefs, held that Rheabelle was always the primary beneficiary, and the disinherited Swank brothers would only inherit if their mother had predeceased their father, which did not occur. Thus, because their right to inherit was only contingent and never vested, it was impossible for the disinherited Swank brothers to have any claims under their father's Will when he died. Accordingly, they lacked legal standing to advance the intentional interference claim. The Fifth District Court of Appeals rendered judgment and reversed the more than \$1.5 million verdict.

If you have questions or concerns about the status of your estate planning or this type of litigation, please feel free to contact Angela Carlin, Shawn Maestle or your Weston Hurd lawyer.



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