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Proving testamentary capacity in suits involving tortious interference with inheritance

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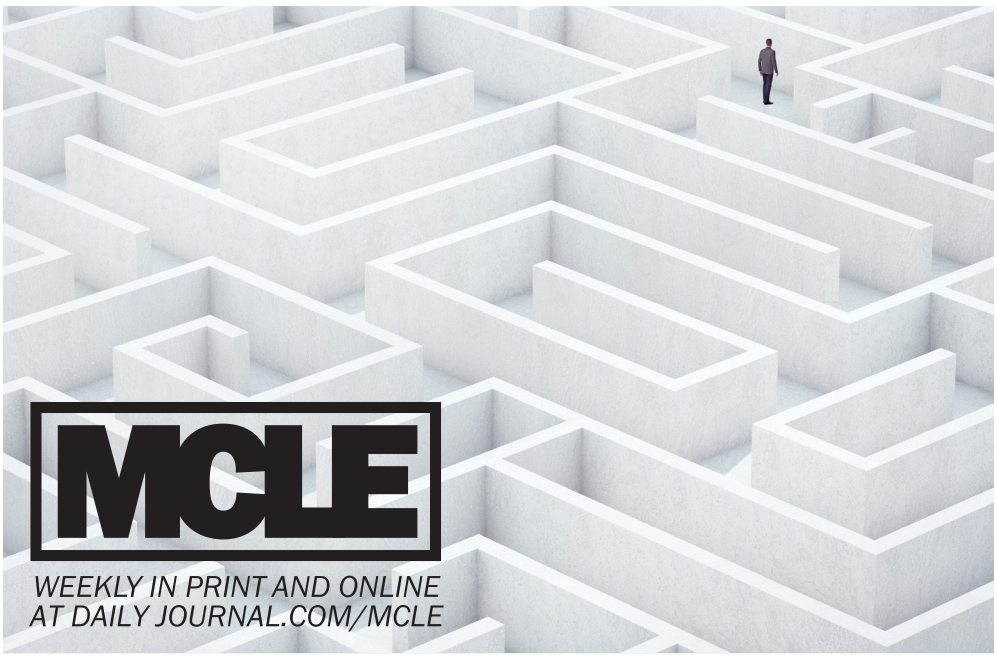

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Only in the last decade have California courts recognized as tortious conduct the intentional interference by one person in the expected inheritance of another. Late to the game, by then more than half of the states had sanctioned such a cause of action. The tort was first incorporated in the Restatement (Second) of Torts in 1979 at Section 774B as follows: "One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift."

Known as IIEI, the new tort is complicated in definition, rife with emotion and difficult to prove. Lauded by some, including Dean William Prosser, the leading authority of his generation on torts and the Reporter of the Restatement, and criticized by others (see, for example, "Torts and Estates: Remedying Wrongful Interference with Inheritance" by Harvard professors John C. Goldberg and Robert H. Sitkoff), its benefits and drawbacks are readily illustrated in the recent California case of *Gomez v. Smith*, 54 Cal. App. 5th 1016 (2020). In this short article we examine the conflicting place it occupies in the intersection between torts and the rules of testamentary capacity.

California first recognized the tort of intentional interference in expected inheritance in *Beckwith v. Dahl*, 205 Cal. App. 4th 1039 (2012). In that case, plaintiff Beckwith and his partner, Marc MacGinnis, were in a committed relationship for nearly 10 years. They lived together and were occasional business partners. MacGinnis' only living relative was an estranged sister, defendant Dahl. At some point during their relationship, MacGinnis showed Beckwith a will saved on his computer that would split his assets between Beckwith and Dahl. It was never printed or signed. In May 2009, his health declining, MacGinnis was confined to a hospital awaiting surgery. He asked Beckwith to locate the will. When Beckwith could not, MacGinnis asked him to prepare a new one. Using a sample from the internet Beckwith drafted a will in which MacGinnis left his estate to Beckwith and Dahl in equal shares.

Before presenting this will to MacGinnis, Beckwith shared it with Dahl, who suggested that they create a living trust instead. After some discussion, Dahl told Beckwith not to present the will to MacGinnis and he followed her instructions. Two days later, Macginnis went in for surgery. The doctors told Dahl that there was a risk he would not survive, but she did not share that information with Beckwith. MacGinnis died days later, intestate, his estate passing entirely to Dahl. Beckwith sued on what were then novel grounds, and Dahl's demurrer was sustained by the trial court without leave to amend.

The Court of Appeal reversed. Intentional interference with expected inheritance now bridges a gap between a tort claim and a will or trust contest. In the former, no remedy was available if the tortious act is directed at the decedent, not the plaintiff. In the latter, no remedy was available if the testamentary document was in fact never executed. The appellate decision in Beckwith lays out a cause of action for IIEI with six elements: (1) an expectation of receiving an inheritance; (2) interference with that expectancy by a third party; (3) interference that is deliberate and intentional; (4) interference that is independently tortious; (5) a plaintiff who suffers damages; and (6) tortious conduct was directed at someone other than the plaintiff, such that the plaintiff has no other remedy at law. *Beckwith*, at 1057.

Those critical of the tort of IIEI argue that such a cause of action runs counter to core policies of inheritance laws that protect the freedom of disposition by a testator, before whose death no one has an interest in an expectancy, and similarly violates settled tort policies that prohibit a plaintiff from pursuing an action for injuries to another. The only way to compensate a plaintiff for such interference is to recognize in such person a right to an expectancy during the lifetime of another that estate and trust law has steadfastly rejected. Goldberg and Sitkoff, "Torts and Estates: Remedying Wrongful Interference with Inheritance," Stanford Law Review, Vol. 65:335 (2013).

California courts considered IIEI several times after *Beckwith*. In the unpublished opinion *Webster v. Webster*, 2019 Cal. App. Unpub. LEXIS 740, the Court of Appeal affirmed the trial court's dismissal due to, inter alia, a failure to prove the second of the *Beckwith* elements: that defendant's action interfered with an expected inheritance. In doing so, the court spoke in the cause-in-fact

language so familiar in traditional tort causes of action. Quoting *Beckwith*, the court stated that a plaintiff must allege facts to show that "but for the interference of a third party, [the plaintiff] would have inherited from the decedent." *Webster* at 15.

In analyzing the cause of action, however, the cases have not focused on the requirement that the decedent have the competence to execute a trust or will, a necessary nexus in causation to show that the defendant in fact prevented the decedent from doing so. The recent *Gomez* case addresses this component, but not without complications. In *Gomez*, decedent Frank married Louise in November of 2014, 60 years after breaking off their first engagement. In the intervening years he was married, widowed and fathered four children with his first wife. Within 18 months of his marriage to Louise he suffered a stroke and other health problems, was admitted to the hospital in June of 2016, and thereafter transferred to a nursing home. On Aug. 15, he met with a lawyer, Erik Aanestad, to revise his existing trust to benefit Louise. On Aug. 19, he went home on hospice care, his condition terminal. On Aug. 20, Frank was on morphine and in bed. Aanestad and his paralegal came to meet with him in his home to have him sign the trust amendment, but two of Frank's children barred their entrance, calling the sheriff to escort them from the property. The trust amendment was never signed, and Frank died in the early hours of the next day.

In her suit against Frank's children, Louise alleged several causes of action, including intentional interference with expected inheritance. The trial court found in favor of Louise. On appeal, daughter Tammy Smith argued that Louise failed to prove that Frank had the necessary capacity in the hours that preceded his death to sign the trust amendment prepared for him, and thus failed to state a recognizable claim. In rejecting Tammy's argument, the Court of Appeal staked out positions that will trouble both estate planners and tort lawyers.

The former will find difficulty in the facts of *Gomez* that Frank had the capacity to sign the trust amendment on the day that attorney Aanestad arrived to present it to him. Only 14 hours before his death, he was heavily medicated, vomiting, incontinent, confined to bed, and capable of expressing only a few words. He would have needed the ability to review and understand 93 pages of complex estate planning documents.

This finding contradicts recent California legislation and the trend in reported cases that have sharpened dramatically the standard for testamentary capacity in estate planning matters. The time-honored test set forth in California Probate Code Section 6100.5, that a testator knows his or her family, assets and the disposition he or she is making, is on its face applicable now only to wills. California courts had held for many years that the same low measure of testamentary capacity applied to the now-common revocable trust, since they merely function as will substitutes. *Goodman v. Zimmerman*, 25 Cal. App. 4th 1662 (1994). But Probate Code Section 811, enacted in 1995 as part of the Due Process in Competency Determinations Act, applicable to various actions including the execution of a trust, requires that an individual be examined for:

1. Alertness and attention, including level of arousal or consciousness, orientation to time, place, person and situation, and the ability to attend and concentrate.

2. The ability to process information, understand and communicate with others, recognize familiar objects and persons, understand and appreciate quantities, reason using abstract concepts, plan, organize and carry out actions in one's own rational self-interest, and reason logically.

3. Evidence of stable thought-processes, demonstrated by the absence of severely disorganized thinking, hallucinations, delusions, or uncontrollable, repetitive or intrusive thoughts.

4. The ability to modulate mood and affect.

In *Lintz v. Lintz*, 222 Cal. App. 4th 1346 (2014), the decedent executed a trust amendment leaving most of his estate to a second spouse in a complicated pattern of life estates and powers of appointment. On his death his children contested the documents. The trial court applied the standard of testamentary capacity set forth in Probate Code Section 6100.5 to the trust and trust amendments, and the Court of Appeal reversed, stating: "[W]e conclude that the Probate court erred by applying the Probate Code Section 6100.5 testamentary capacity standard to the trusts and trust amendments at issue to this case instead of the sliding scale contractual standard in Probate Code Section 810-812. The trust instruments here were unquestionably more complex than a will or codicil." *Id.* at 1352.

On the facts set forth in the *Gomez* opinion, testamentary capacity based on Probate Code Section 6100.5 is questionable, and compliance with the more stringent test under Probate Code Section 811 highly unlikely, and therefore a cause of action should not lie for interference with an expectancy that the plaintiff could not prove she would ever have received.

Tort litigators also will find fault with the reasoning in *Gomez* and the parties dispute over who has the burden of proving Frank's testamentary capacity. Although the *Beckwith* decision makes clear that a plaintiff has the burden of proving causation, the opinion in *Gomez* states that defendant Tammy has the burden of proving that Frank lacked capacity to execute the trust. Reasoning that if the trust amendment had been executed by Frank before his death Tammy would have to challenge it on the basis of lack of capacity, the court stated, "We see no reason nor logic for placing a burden on Louise that she would not have had to carry if the wrong had not been done. Tammy may not take advantage of her own wrong." *Id.* at 1040. The result is to treat capacity as an affirmative defense rather than an element of the cause of action, putting the burden of proof on the defendant, in direct contrast to what is the case in a will or trust contest.

First adopted in California in *Beckwith* in 2012, the tort of intentional interference with expected inheritance occupies a novel space between established doctrines of tort liability and testamentary contests. As the recent *Gomez* case illustrates, the tort is not entirely one or the other, as courts both attempt to absorb the substantive tests of testamentary capacity and shift to the defendant some of its procedural burdens of proof at trial. ■

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