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MARCH 2021 NEWSLETTER

501 WEST BROADWAY, SUITE 700
SAN DIEGO, CALIFORNIA 92101-3563
TELEPHONE: (619) 239-7777
FAX NUMBER: (619) 238-8808

Firm News:

Brad Dewan spoke on the topic of “Enhancing And Improving Your Planning For IRAs And Qualified Retirement Plans” to the Estate Planning Council of San Diego on February 16, 2021.

Katie Lepore’s article on the importance of estate planning was published by the American Bar Association’s GPSolo eReport, a monthly electronic newsletter that includes valuable practice tips, news, technology trends, and feature articles on substantive practice areas for the nationwide ABA Solo, Small Firm and General Practice Division.

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**INTERFERENCE WITH
INHERITANCE: A NON-
PROBATE TORT**

By Erika P. Sanchez, J.D.

In 2012, a new cause of action arose in California trust and estate litigation: intentional interference with expected inheritance (“IIEI”). IIEI is a civil cause of action that allows a plaintiff to recover where a defendant’s wrongful conduct caused the testator to take an action (or prevented the testator from taking an action) that resulted in the plaintiff being deprived of his or her expected inheritance.

IIEI developed to provide a remedy when (1) the plaintiff has no independent tort action because the tort was directed at the testator (rather than

at the plaintiff), and (2) the plaintiff has no adequate remedy in probate.

In *Beckwith v. Dahl*,¹ the seminal case that officially recognized IIEI in California, the court emphasized the need to protect the integrity of the probate system.² For instance, an IIEI claim is not appropriate if someone was a named beneficiary in a previous trust or Will and was removed as a beneficiary in an amendment or codicil. In this situation, a disinherited beneficiary has the ability to file a contest in probate court. Only if the plaintiff is unable to challenge a trust or Will in probate court can he or she consider suing in civil court for intentional interference with expected inheritance.

To properly plead a cause of action for IIEI, the plaintiff must allege the following elements:

¹ *Beckwith v. Dahl* (4th App. 2012) 205 Cal. App. 4th 1039.

² *Id.* at 1056.

- (1) Plaintiff had the expectancy of an inheritance;
- (2) Causation: but for the alleged interference, the bequest or devise to plaintiff would have been in effect at the time of decedent's death;
- (3) Intent: defendant knew of plaintiff's expectancy of inheritance and took deliberate action to interfere with it;
- (4) The interference was conducted by independent tortious means, in other words, the underlying conduct is wrong for some reason other than the fact of the interference;
- (5) Plaintiff was damaged by defendant's interference; and
- (6) Defendant directed the wrongful conduct at someone other than plaintiff.

Examples of the underlying tortious conduct include fraud, duress, defamation, and abuse of fiduciary duty.³ It is not necessary to allege that plaintiff is or was a beneficiary of the estate.⁴

Last September, an appellate court issued California's first published opinion affirming a judgment in favor of a plaintiff on an IIEI claim. In *Gomez v. Smith*,⁵ the defendant, decedent's daughter, was unhappy with her father's marriage to the plaintiff, her step-mother, and sought to prevent her father from confirming an estate plan benefitting the step-mother.⁶ The decedent's daughter knew of the decedent's physical weakness and took actions to physically separate him from his attorney, which culminated in a dramatic confrontation between the daughter and the estate planning attorney outside of the testator's home.⁷ The court found that the daughter's conduct constituted undue influence.

Although the facts in *Gomez* are unusual, this illustrates how and when an IIEI claim can be

successful in California courts. For individuals who do not have standing to bring an action in probate court, or the ability to sue for another tort because the conduct was not directed at them, IIEI may be a valuable cause of action to pursue to ensure the plaintiff's rights are preserved.

While *Gomez* is informative, California law on intentional interference with expected inheritance is new and mostly unsettled. We expect to see it continue to evolve in the coming years.



CALIFORNIA ENTITY FILING REMINDER

By Colleen S. Ergastolo, Paralegal

It is common at the beginning of the year to establish a new year's resolution, or to evaluate goals for the year. Miller, Monson, Peshel, Polacek & Hoshaw is invested in helping you with your estate, tax, and business planning, which for some clients includes establishing and keeping an active status for a business entity. Our office can help you maintain current active status for your California businesses with your annual or bi-annual entity filings. Failure to maintain your California entity in good standing could affect its ability to conduct business, possibly resulting in penalties or a loss of your entity's legal name.

Depending on the entity type, if your entity is active, you may be filing a tax return to reflect its net income received and any disbursements and/or expenses incurred for the year. In addition to this, you will want to make sure that the Secretary of State forms are properly filed to maintain the entity's active status.

For California corporations, the Statement of Information (Form SI-550) is due every year within a 6-month window ending on the last day of the month in which the entity was first formed. (The initial Form SI-550 is due within

³ *Gomez v. Smith* (3d Dist. 2020) 54 Cal. App. 5th 1016, 1032.

⁴ *Beckwith*, 205 Cal. App. 4th at 1057.

⁵ *Gomez*, 54 Cal. App. 5th at 1020.

⁶ *Gomez*, 54 Cal. App. 5th at 1033.

⁷ *Id.*

90 days of the entity being established.) For example, if you formed your entity on June 1st, your filing period each year would be from January 1st to June 30th. If you had no changes from the prior year, you may choose to file a “no change” form (i.e., Form SI-550NC). The Secretary of State has other variations on these forms related to the type of entity, such as a domestic, foreign, or non-profit corporation.

With regard to Limited Liability Company (LLC) filings, a Statement of Information (Form LLC-12) is due every two years. (The initial Form LLC-12 is due within 90 days of the entity being established.) Thereafter, the filing window is similar to the corporate filings (except it is due every other year). The window starts 6 months from the original month the Articles were filed, up to the ending date of the month of initial formation. For example, if you formed your LLC on June 1, 2020, your filing period would be from January 1st to June 30th for “even” years. If you have had no changes from the prior filing, you may choose to file a “no change” form (i.e., Form LLC-12NC). If there are changes in managers and members, the Secretary of State will require notification to reflect the changes by completely filling out the Form LLC-12 at the time of the change (not based on the bi-annual filing schedule). The Secretary of State has an additional Form LLC-12A if there is a need to report more than one manager or member.

The California Secretary of State has a business division which provides free images of these public filings and shows an entity’s current status and what forms have been filed for the entity. You may use this link for a review of your entity here: <https://businesssearch.sos.ca.gov/>. Some forms (such as the required Statement of Information) can be filed online through the Secretary of State’s portal system. The following link is available for filing eligible forms online through the California Secretary of State: <https://www.sos.ca.gov/business-programs/bizfile>.

Importantly, if you have an out-of-state entity, we recommend you review that state’s entity compliance requirements, as each state has its own Secretary of State or business entity division. If you prefer to have assistance in your timely filings, please be sure to contact our office when you receive your reminder from the Secretary of State, and we may be able to help with the required filing.

The information provided above is a relevant reminder to ensure your entity is compliant for the year.



FEDERAL TAX NEWS

By Katie Lepore, CPA, J.D.,
LL.M., Taxation

IRS Online Power of Attorney Submission.

The IRS has created a new online portal to allow tax professionals to submit Forms 2848 electronically, signed by electronic signature. To do so, the tax professional must have a Secure Access username and password, which requires the user to go through a lengthy authentication process.

Social Security Withholding.

The IRS issued Notice 2021-11 to explain how employers which deferred employee Social Security taxes in late 2020 can pay the deferred taxes throughout 2021. The August 8, 2020 Presidential memorandum allowed deferral of certain employees’ Social Security taxes from September 1, 2020 to December 31, 2020, to be paid back by April 2021. The *Consolidated Appropriations Act, 2021*, passed December 27, 2020, extends the repayment period for such deferred taxes to December 31, 2021.

Proposed User Fee for Estate Tax Closing Letters.

The IRS issued proposed regulations that would levy a \$67 fee for every request to issue an estate tax closing letter after the filing of an estate tax return. Such letters have been widely used to confirm when the estate tax

return is accepted as filed, to help administer an estate and allow probates to close in some states. The fee will apply to all requests received after 30 days have passed from the date final regulations are published.

Bill to Repeal SALT Cap. On January 5, 2021, Representative Mike Garcia (R-CA) introduced *H.R. 202*, to repeal the \$10,000 cap on state and local tax (“SALT”) as itemized deductions, implemented by the 2017 *Tax Cuts and Jobs Act*. The bill has been referred to the Ways and Means Committee. This bill is important in states like California that have high state income tax rates.

Sen. Wyden Reaffirms Interest in Mark-to-Market. Senator Ron Wyden (D-OR), the new Chair of the Senate Finance Committee, has publicly reaffirmed his interest in creating an annual mark-to-market taxing system for high-net-worth households. Such a scheme aims to mark capital assets to fair market value on an annual basis to pay tax on the appreciation each year. He would also like to tax capital gains at ordinary rates for high income households. One of President Biden’s tax goals is also to tax capital gains at ordinary rates for taxpayers earning over \$1 million, though the support for such measures remains to be seen. Senator Wyden and President Biden also support an increase to the corporate income tax rate.



CALIFORNIA TAX UPDATE
*By Katie Lepore, CPA, J.D.,
LL.M., Taxation*

California Proposes Pass-Through Entity Tax. On January 5, 2021, *SB 104* was introduced in the California Legislature by Senators Mike McGuire (D-Marin) and Anna Caballero (D-Central Valley) to establish an elective pass-through entity-level tax. Its goal is to help small business owners who were

negatively impacted by COVID-19. The pass-through tax would allow California taxpayers who are owners in select pass-through entities to deduct for federal income tax purposes state and local taxes exceeding the \$10,000 cap, so long as such payments are consistent with IRS Notice 2020-75. Entities taxed as partnerships or S-corporations which have only individuals as members may be eligible. The bill is in committee and is expected to go through several rounds of edits before voting.

Proposed California Corporate Tax Increase. California *AB 71*, introduced by Assembly members David Chiu (D-San Francisco), Luz Rivas (D-Arleta), Buffy Wicks (D-Berkeley) and Richard Bloom (D-Santa Monica) on January 13 proposes an increase to the California corporate income tax rate and also seeks to establish global intangible low-taxed income (GILTI) rules. If passed, the corporate rate would increase from 8.84% to 9.6% for businesses with taxable income over \$5 million, beginning January 1, 2022. The tax would be used to create affordable housing, support emergency shelters, and provide services to the homeless.

Eviction Moratorium Extended. Effective February 1, 2021, Governor Newsom signed *SB 91*, extending many of the protections in *AB 3088*, providing a residential tenant eviction moratorium through June 30, 2021. Tenants must pay 25% of the rent due to be protected by the laws. *SB 91* also creates a State Rental Assistance Program to help alleviate the burden of those who have been negatively impacted by COVID-19.

Local Business Tax Filing Deadlines Extended. San Francisco extended the deadline for its 2021 Annual Business Tax Return including for payroll tax expense and gross receipts tax to April 30, 2021. The 2020 Business Registration Tax Return originally due June 1, 2020, which was extended until March 1, 2021 is further extended to April 30, 2021. Los Angeles Business Tax returns are due by March 1, 2021, though a 45-day extension may be available.

Employee Designation to Apply Retroactively. After the ground-breaking *Dynamex* case holding in 2018, creating a stringent test for classifying workers as employees over independent contractors, the California Supreme Court has held in *Vasquez v. Jan-Pro Franchising* that the holding applies retroactively. For any existing litigation dealing with employee/employer claims that have not been decided, the *Dynamex* holding and “ABC” test will apply retroactively to any open claims.

Disclaimer: This newsletter is provided to share knowledge and expertise with our colleagues with the goal that all may benefit. The content of this newsletter is for general information purposes only.

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†OF COUNSEL

RALPH GANO MILLER
1926 – 2016

<https://www.mmpph.com>



DeEtte L. Loeffler, Esq., Newsletter Editor

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