

Reprinted with Permission by the Daily Recorder

Court of Appeal Recognizes New Tort in California

Earlier this month, the Fourth Appellate District, Division Three did something relatively rare these days: it adopted a common law tort that has never previously been recognized in California. In *Beckwith v. Dahl* (May 3, 2012) ___ Cal.App.4th ___, 2012 Cal.App. LEXIS 528, the court concluded, “it is time to officially recognize” the tort of intentional interference with an expected inheritance (IIEI), joining the majority of other states that have considered the issue.

Background of *Beckwith v. Dahl*

Beckwith involved demurrer proceedings, so the facts are taken from the plaintiff’s complaint in that case. See *Beckwith, supra*, Cal.App. LEXIS at pp. 2-9. Beckwith and his partner, MacGinnis, were in a long-term committed relationship for nearly 10 years. MacGinnis had no children and his parents were deceased; his only living family was his sister, Dahl, with whom he had an estranged relationship. At some point, MacGinnis showed Beckwith a will he had saved on his computer, which provided that his estate would be divided equally between Beckwith and Dahl.

In 2009, MacGinnis’s health began to decline, and he required surgery. In the hospital, MacGinnis asked Beckwith to find and print his will, so he could sign it. Beckwith looked for the will, but could not find it. MacGinnis asked Beckwith to create a will so he could sign it the next day. Beckwith created a new will, using a form he found on the internet, providing for division of the estate equally between Beckwith and Dahl.

Before giving the will to MacGinnis, Beckwith contacted Dahl and informed her about the will. He also emailed her a copy. Dahl suggested that they should look into a trust for MacGinnis to avoid probate, and she said she would contact her attorney friends to prepare the documents. Dahl told Beckwith not to give the will to MacGinnis since one of her friends would be preparing the trust documents for MacGinnis to sign in the next couple of days. Beckwith did not give the will to MacGinnis.

MacGinnis had surgery two days later. The doctors informed Dahl that there was a chance MacGinnis would not survive; they could not discuss the matter with Beckwith since he was not a family member by law. Dahl did not tell Beckwith about the risks of the surgery. She never gave MacGinnis any documents to sign. After the surgery, MacGinnis had to be placed on a ventilator and his health worsened. Six days later, Dahl removed MacGinnis from the ventilator, following the doctors’ recommendations. MacGinnis subsequently died intestate leaving a \$1 million estate.

Beckwith spoke with Dahl following MacGinnis's death, suggesting they try to find the will MacGinnis had prepared. Dahl said, "we don't need a will." Dahl opened probate in superior court and verbally told Beckwith about the probate, but did not send him any copies of the filings, nor did she identify him as an interested party in the probate. Eventually Dahl informed Beckwith that MacGinnis had died intestate, she was the executor of his estate, his assets would go to her as his only surviving family member, and Beckwith had no rights to the estate.

Beckwith filed a civil action against Dahl alleging IIEI, deceit by false promise, and negligence. The trial court sustained a demurrer, noting that California had not recognized a tort for IIEI, and even if it did, Beckwith had not alleged independently tortious conduct as required in other jurisdictions that did recognize the tort. The court of appeal, in a published decision, reversed, holding that California should recognize the tort of IIEI, and that Beckwith should be given a chance to amend his complaint to allege independently tortious conduct.

Elements of IIEI

The elements of IIEI, as identified by *Beckwith* and as adopted in other states, are as follows: "(1) an expectation of receiving an inheritance; (2) intentional interference with that expectancy by a third party; (3) the interference was independently wrongful or tortious; (4) there was a reasonable certainty that, but for the interference, the plaintiff would have received the inheritance; and (5) damages." *See Beckwith, supra*, Cal.App. LEXIS at p. 11.

The court emphasized two things with respect to this tort. First "an IIEI defendant must direct the independently tortious conduct at someone other than the plaintiff—normally the testator. *Id.* at pp. 29-30. In other words, the conduct "induced or caused the testator to take some action that deprives the plaintiff of his expected inheritance." *Id.* at p. 30. The second, related point is that an IIEI claim is for "wrongful interference with an expected inheritance and not an independent action for the underlying tortious conduct such as fraud or undue influence." *Id.* at p. 31.

Beckwith had not alleged that Dahl directed her wrongful conduct at MacGinnis; the only wrongful conduct alleged was Dahl's false promise to him. The court permitted Beckwith to amend his complaint to address this element.

Policy considerations for recognizing a new tort

Tort law is comprised of both common and statutory law; common law is recognized by the courts. However, it is unusual to see an opinion recognizing a new common law tort. *See, e.g., Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464 and

Cedars-Sinai Medical Center v. Superior Court (1998) 18 Cal.4th 1 (declining to recognize independent tort for spoliation of evidence).

The *Beckwith* court observed, “[t]he law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff’s interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.” See *Beckwith, supra*, Cal.App. LEXIS at p. 10, quoting Prosser & Keaton, *Torts* (5th ed. 1984) § 1, p. 4, fn. omitted.

Ultimately, to recognize a new tort, the court has to consider relevant policy considerations and balance the benefits of recognition against the burdens and costs of recognizing the tort. *Id.* at p. 13. The parties in *Beckwith* all agreed that California had not recognized the tort of IIEI; however, 25 of 42 states that had considered the issue decided to recognize the tort. *Id.* at p. 11.

The court identified several policy concerns related to recognition of IIEI. First, it concluded that recognition of the tort would not unduly burden the probate system or destabilize the law of probate by allowing plaintiffs to usurp a testator’s true intentions. The states which had adopted the tort had balanced this concern by prohibiting it where a will contest remedy is available and would provide the plaintiff with an adequate remedy. *Id.* at pp. 15-16. Second, the court dismissed the concern that the tort was contrary to the idea that gratuitous promises are generally not enforceable. The court noted that California recognizes other torts that protect expectancies, such as intentional interference with expected contract or prospective economic advantage. Moreover, IIEI requires a “reasonable certainty that, but for the interference, the plaintiff would have received the inheritance.” *Id.* at p. 21. Finally, the court dismissed concerns that one’s expectancy in an inheritance is too speculative, for the same reasons. *Id.* at pp. 21-22.

In sum, the court of appeal held that “a court should recognize the tort of IIEI if it is necessary to afford an injured plaintiff a remedy.” *Id.* at p. 26. The court recognized restrictions on the tort to preserve the integrity of the probate system and avoid inherently speculative claims, balanced against “society’s interest in providing a remedy for injured parties.” *Id.* at pp. 26-27.

C. Athena Roussos is an attorney in Elk Grove, California and is certified as an Appellate Law Specialist by the California State Bar Board of Legal Specialization. Roussos can be reached at (916) 670-7901 or athena@athenaroussoslaw.com.

Peg Carew Toledo contributed to this article. Toledo is a partner at Mennemeier, Glassman & Stroud LLP, a Sacramento civil litigation boutique. She is also certified as

an Appellate Law Specialist by the California State Bar Board of Legal Specialization.
Toledo can be reached at (916) 551-2592 or toledo@mgsllaw.com.