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VIA E-MAIL: kirkgiordano@gmail.com

February 12, 2016

Kirk Giordano
2318 Eagle Ave.
Alameda, CA 94501

Re: OPINION LETTER RE:
Hiehie, LLC v. Giordano

Dear Mr. Giordano:

You have asked us to provide you an opinion as to the status and nature of the litigation entitled *Hiehie, LLC v. Giordano* (Circuit Court of the Second Circuit, State of Hawaii, Case # 15-1-0255(1)), including aspects of the Defendants and counsel's handling of the matter. This letter represents our opinion on a number of those issues. Our opinion is based on the materials you have provided to us and our understanding of the laws applicable to you as a California resident.

SMITH PATTEN is primarily a California firm, focused on the application of California and Federal Law. Although I personally have a certain familiarity with Hawaii state law, we are not admitted to practice in the State of Hawaii, and therefore limit our opinions to general principles of law. The opinions set forth herein are based upon our review of the facts and Scope set forth below. Should a change in either the facts or law occur, such changes may implicate our opinions set forth herein.

FACTUAL BACKGROUND

This case involves a land ownership dispute regarding real property, located at 1020 Hiehie Street, Makawao, Hawaii 96768, between you (the current owner) and Hiehie, LLC, a third party claiming to have purchased the right of redemption from the alleged heir to 50% of the subject property. In 1987, Julia K. Martin granted the subject property to Moana Penelope Martin Ramos and Julia Keikioewa Talifolau as tenants in common via a Warranty Deed, recorded October 19, 1987. On August 23, 2013, the County of Maui recorded a Certificate

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of Tax Lien (Doc. # A-49831100), which recorded a lien against the subject property due to the indebtedness of the taxpayers, Moana Ramos and Julia K. Martin.

Plaintiff Hiehie, LLC, the purported assignee for the Estate of Moana Ramos, allegedly purchased Ms. Ramos's one-half share from her daughter, Kimberly Kehaulani Caspillo, for \$10,000. However, there is no recorded deed transferring ownership to Ms. Caspillo or any evidence that Hiehie, LLC obtained Ms. Talifolau's 50% share.

On May 20, 2014, the County of Maui conducted a tax foreclosure pursuant to the lien; you subsequently purchased the property for \$60,000.00. The County thereafter recorded a Tax Deed on July 23, 2014 which conclusively transferred title to you. After your purchase, you invested a significant amount of time and money (approximately \$120,000.00) to rehabilitate the foundation, house, and garage on the subject property. Your efforts were fruitful in successfully obtaining approval for homeowners insurance of the subject property.

Plaintiff Hiehie, LLC initially filed suit against you on or around May 15, 2015.

QUESTIONS

1. What are the ethical ramifications for Attorney – whom purportedly represented the Estate of Moana Ramos – when he formed Hiehie LLC, of which he is member, that became the assignee of Kimberly Caspillo's right of redemption (the purported sole heir of the Estate of Moana Ramos) in a piece of real property purchased by tax deed by Kirk Giordano?
2. Is there a basis to disqualify or take other action against Matson, and if so, what is the procedure?
3. Can someone other than the taxpayer redeem property sold pursuant to a tax deed under Hawaii's redemption statute?
4. What are the weaknesses in Hiehie, LLC's case?
5. Of the available options, what are the risks and benefits?

ANALYSIS

1. ETHICAL RAMIFICATIONS FOR OPPOSING COUNSEL

The first question is what ethical rules apply and what are the potential consequences for the conduct of opposing counsel in this matter.

a. Rules of Professional Conduct

Hawaii Rules of Professional Conduct, Rule 1.8¹, governs "conflict of interest: prohibited transactions." The first portion of Rule 1.8 governs attorneys engaging in business with a client. The comments to the Rule of Professional Conduct give an indication of how a court would apply the rules and what the Hawaii Supreme Court had in mind when it made the rules in the first place.

The comments to Rule 1.8 state that the following requirements apply to "lawyers purchasing property from estates they represent." This appears to apply to Matson. Lawyers representing the administrator of the estate (in the case of an intestate estate), and the facts do not state whether Caspillo was the administrator. If she is the administrator, the rules to follow will apply. If Caspillo was merely an heir, then the Attorney would seem to be unaffected by the client-transaction ethics rules because the Attorney of the Estate does not represent heirs. (The Attorney would have to comply with the regular ethics rules, like informing Caspillo that he is not her attorney and does not represent her interests, etc.) If Caspillo was the administrator, and the Attorney represented her in that capacity, then: (1) the transaction must be fair to Caspillo; (2) the transaction must be communicated to Caspillo; (3) Caspillo must be informed to get other counsel to review the transaction; and (4) Caspillo must consent in writing to the transaction and to the lawyer's role.

Given what appears to be the nature of the relationship between Matson and Caspillo, including drug addiction, rehabilitation, and halfway houses, there appear to be serious questions as to whether Matson could comply with the foregoing requirements. If all of the foregoing requirements are met, then Matson would not have ethical exposure under Rule of Professional Conduct 1.8 for taking an assignment from Caspillo.

The amount allegedly paid by Hiehie and/or Matson to Caspillo, is negligible, given the current value of the property (\$10,000 versus hundreds of thousands). As such, there is an argument to be made that the difference is a gift from Caspillo to Matson, and such gifts may be prohibited under subsection (c) of Rule 1.8.

1 Rule 1.8. CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS.

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner which can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in the transaction; and
- (3) the client consents in writing to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

... *Id.*

Another rule of professional conduct that could apply is Rule 4.3 concerning "lawyer as witness" issues. Rule 4.3 states that a lawyer shall not act as **advocate at a trial** in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client. Here, Attorney may be in violation because whether the transaction between Caspillo and Hiehie complied with law may be a contested issue. Matson would clearly be a witness to (1) the formation of Hiehie LLC, (2) the demands for redemption, (3) the allegations that he represents the estate, and (4) the transaction between Hiehie and Caspillo, and whether it constituted a gift or other irregularity. Accordingly, a motion to disqualify Matson would at least appear to have a good faith basis. Whether it would be granted by the Court or not is another matter, and would depend upon whether the judge would allow you to obtain the deposition of Matson in the case.

2. PROCEDURAL ISSUES IN MOVING TO DISQUALIFY OPPOSING COUNSEL

Assuming from the analysis above that there is a basis to move to disqualify opposing counsel, what are the issues, procedures, and likelihood of success? The answer is that generally, under Hawaii precedents, it is the client who has the "standing" (ability to complain to the court) that an attorney should be disqualified. Most cases dealing with the issue of a non-client alleging opposing counsel's conflict of interest do so in the context of motions to disqualify the alleged infringing lawyer. *See, e.g. Silver v. Castle Memorial Hospital*, 53 Haw. 98, 488 P.2d 142, (1971); *Lau v. Valu-Bilt Homes, Ltd.*, 59 Haw. 283, 297, 582 P.2d 195, 204 (1978); *Decaview Distribution Co., Inc. v. Decaview Asia Corp.*, 2000 WL 1175583 (N.D. Cal. 2000). In *Decaview*, the court instructed that:

[o]nly under certain, narrowly defined, circumstances would a non-client litigant have standing to move to disqualify opposing counsel: 'Recognizing the potential abuses of the Rules in litigation . . . the burden of proof must be on the nonclient litigant to prove by clear and convincing evidence (1) the existence of a conflict and (2) to demonstrate how the conflict will prejudice the fairness of the proceedings.'

2000 WL 1175583 at *8 (quoting *Coyler v. Smith*, 50 F. Supp. 2d 966, 971 (C.D. Cal. 1999) (internal citation and quotation marks omitted.)

Here, the rule at issue is HRPC Rule 1.8, which unlike Rule 1.7 for concurrent conflicts of interest, does not have anything in the comments about non-party attorneys moving to disqualify. Even in the Rule 1.7 comment, the rules seem to be against opposing counsel moving to disqualify: "*Where the conflict is such that it clearly calls into question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.*"

The conflict of interest between the lawyer and the assignor affects the fairness (possibly) of the transaction between them. That is why the Hawai'i Rules of Professional Conduct address what needs to be done with respect to that transaction (i.e., fairness, openness, and informed consent). Accordingly, if you bring a Motion to Disqualify Opposing counsel, it may or may not succeed. Even if successful, Hiehie, LLC can simply hire another attorney and continue with the litigation.

3. REDEMPTION BY THE ASSIGNEE OF THE TAXPAYER

Based upon our review of the authorities cited by your counsel and opposing counsel, and our own research, it appears that the assignee of a taxpayer can redeem after a tax deed. Unfortunately neither your counsel nor opposing counsel cited to the most applicable case, which is *Serion v. Thornton*, 104 Haw. 79, 86, 85 P.3d 186, 193 (Ct. App. 2004), where the court addressed the specific statute that is at issue in your case: Hawai'i Revised Statute §246-60.

Since a properly conducted tax sale "is binding on all parties with a legal or equitable interest in the property as well as all parties with notice of the proceedings which notice may arise constructively as a result of the requisite published notices[,]" *id.* at 39-51 to 39-52, it is well-settled that

[a]ny person with a substantial interest affected by the tax sale has the right to redeem. Eligible parties include the party assessed for the tax; the record owner; the successor in interest through transfers to heirs, devisees, and purchasers; an occupant of the property including an adverse possessor; and any parties with liens in the property, such as mortgagees and judgment creditors.

Id. at 39-60 to 39-61. See also 72 Am.Jur.2d *State and Local Taxation* § 909, at 307 (2001) (stating that "[t]he right or privilege of redemption from a tax sale is granted to and may be exercised by the former owner of the forfeited land, the former owner's successors in interest, or any other person who has a legal or equitable interest in the land.").

Although the *Serion* case is a Court of Appeals case (one step lower than the Hawaii Supreme Court), it is right on point. Here, the presented facts show Hiehie, LLC is a successor in interest through a transfer as a purchaser from the sole heir of half of the intestate estate: Caspillo. According to *Serion*, one needs to have a "substantial interest" to have the right to redeem, and as purchasers, Hiehie, LLC, though belatedly, has such a right before the redemption period expired.

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4. POTENTIAL WEAKNESSES IN HIEHIE, LLC'S CASE

a. Identification of Proper Heirs/ Other Ownership.

The March 15, 2001 deed from Jerry, Moana, and Kimberly to Moana as tenant in severalty severed all claims to title or possession by Kimberly, as tenancy in severalty is property held by a single individual, severed from all other claims. Tenancy in severalty is used when the prior title and possession was by a tenancy in common. A tenancy in severalty is completely subject to probate on the death of the tenant in severalty. Accordingly, when Moana passed away, the Estate of Moana held complete title to the property, and depending upon what occurred during the probate of her estate, potential claimants to the property may still exist. This is a fact that may preclude summary judgment.

There appears to be an open question as to whether a one-half interest owner can redeem the entirety of the ownership of the property by redemption. It appears that if Hiehie, LLC is successful in redeeming, then they may have a half ownership interest at best.

b. Technical Failure to Include Cost of Deed Recording in Redemption

Furthermore, in order to avail itself of the benefits of the statute, the taxpayer must comply with all aspects of the statute. The Complaint, at ¶ 10, cites to the Hawaii Revised Statutes concerning tax deeds and redemption:

§246-60 Same; tax deed; redemption. The tax collector or the tax collector's assistant shall, on payment of the purchase price, make, execute, and deliver all proper conveyances necessary in the premises and the delivery of the conveyances shall vest in the purchaser the title to the property sold; provided that the deed to the premises shall be recorded within sixty days after the sale; provided further that the taxpayer may redeem the property sold by payment to the purchaser at the sale, within one year from the date thereof, or if the deed shall not have been recorded within sixty days after the sale, then within one year from the date of recording of the deed, of the amount paid by the purchaser, together with all costs and expenses which the purchaser was required to pay, including the fee for recording the deed, and in addition thereto, interest on such amount at the rate of twelve per cent a year, but in a case of redemption more than one year after the date of sale by reason of extension of the redemption period on account of late recording of the tax deed, interest shall not be added for the extended redemption period. [L 1932 2d, c 40, pt of §66; RL 1935, pt of §1961; am L 1939, c 221, pt of §7; RL 1945, pt of §5168; am L 1951, c 133, §6; RL 1955, §128-43; HRS §246-60; gen ch 1985]

Although, you, as purchaser of the tax deed, have a duty to disclose the redemption amount to taxpayer (58 H. 53, 564 P.2d 436; 39 H. 378, 381), the amount of recording the tax deed is available to any person who asks the recorder.

It is unclear whether Matson Kelly or Hiehie, LLC tendered the fee for recording the deed in its February 24, 2015 letter. The Complaint, at ¶ 24, also mis-cites to the Maui County Code at "3.148.270." The correct citation is to 3.48.270, which provides as follows:

3.48.270 - Tax deed-Redemption.

The director or his subordinate shall, on payment of the purchase price, make, execute and deliver all proper conveyances necessary in the premises and the delivery of the conveyances shall vest in the purchaser the title to the property sold; provided, that the deed to the premises shall be recorded within sixty days after the sale; provided further, that for any foreclosure without suit pursuant to section 3.48.250, the taxpayer may redeem the property sold by payment to the purchaser at the sale, within one year from the date thereof, or if the deed shall not have been recorded within sixty days after the sale, then within one year from the date of recording of the deed, of the amount paid by the purchaser, together with all costs and expenses which the purchaser was required to pay, including the fee for recording the deed, and in addition thereto, interest on such amount at the rate of twelve percent a year, but in a case of redemption more than one year after the date of sale by reason of extension of the redemption period on account of late recording of the tax deed, interest shall not be added for the extended redemption period.

(Ord. 2404 § 1, 1995: Ord. 1076 § 3 (part), 1980: prior code § 6-1.42)

Again, it is unclear whether the fee for recording the deed was included as part of the alleged redemption. If not, this technicality may be sufficient to void the attempt to redeem, making the attempt ineffective.

OPTIONS

1. Keep Litigating

The first option is to keep litigating the matter in hopes of prevailing at the end. As set forth above, there are genuine issues that can be litigated, including the disqualification of counsel, and potential allegations of fraud and collusion between the Matson, the Hiehie, LLC group, Caspillo, and potentially others. The real question is whether those issues should be litigated. If Hiehie, LLC wins, it will have only a one-half undivided interest in the property, and another lawsuit (or negotiation) would have to occur to obtain complete title in fee simple. If you prevail in the litigation, you would not have to do so. Of course, if Hiehie, LLC loses, they may tie the matter up in appeal for months or years, and the matter would possibly not be laid to rest for years. Throughout that time period, you will likely incur substantial attorneys' fees that you will not be able to get back from Hiehie, LLC or Matson without substantial collateral litigation.

Another litigation tactic would be to litigate the amount of the redemption in order to increase your leverage for settlement. By documenting fully all the improvements you have

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Via E-Mail

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February 18, 2016

Terrance M. Revere
Andrew D. Chianese
970 N. Kalaheo, Suite A301
Kailua, HI 96734

Re: OPINION LETTER RE:
HieHie, LLC v. Giordano

Dear Messrs Revere and Chianese:

Kirk Giordano requested that I forward to you a couple of insights that our office shared with him as part of reviewing his situation vis a vis the above-referenced litigation. As our common client, we believe that this letter is protected by attorney-client privilege and the work product doctrine.

Not being admitted to the Hawaii Bar (though I do have some familiarity with Hawaii law, as I am admitted to the Federated States of Micronesia Bar), we of course limited our review for Mr. Giordano to general legal principles, the impact to him as a California resident, and generic Hawaii case law research. We reviewed the summary judgment briefing, and noted a couple of items, discussed below:

a. Redemption by Assignee of Taxpayer

Based upon our review of the authorities, it appears that the assignee of a taxpayer can redeem after a tax deed. *Serion v. Thornton*, 104 Haw. 79, 86, 85 P.3d 186, 193 (Ct. App. 2004), appears to be pretty closely on point, where the court addressed the specific statute: Hawai'i Revised Statute §246-60.

Since a properly conducted tax sale “is binding on all parties with a legal or equitable interest in the property as well as all parties with notice of the proceedings which notice may arise constructively as a result of the requisite published notices[.]” *id.* at 39–51 to 39–52, it is well-settled that

[a]ny person with a substantial interest affected by the tax sale has the right to redeem. Eligible parties include the party assessed for the tax; the record owner; **the successor in interest through transfers** to heirs, devisees, and **purchasers**; an occupant of the property including an adverse possessor; and any parties with liens in the property, such as mortgagees and judgment creditors.

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Here, Heihe LLC purports to be a successor in interest through an alleged transfer as a purchaser from the sole heir of ½ of the intestate estate: Caspillo. According to *Serion*, one needs to have a “substantial interest” to have the right to redeem. Although the *Serion* case is a Court of Appeals case, it appears to be applicable. Thus it would appear that any attack on the redemption would have to go towards whether there was indeed a timely and good faith transfer, and whether there was full statutory compliance (See below).

b. Redemption by Assignee of a ½ Interest

The March 15, 2001 deed from Jerry, Moana, and Kimberly to Moana as tenant in severalty appears to sever all claims to title or possession by Kimberly, as my understanding of tenancy in severalty is property held by a single individual, severed from all other claims. Tenancy in severalty, as I understand it, is used when the prior title and possession was by a tenancy in common, and is completely subject to probate on the death of the tenant in severalty. Accordingly, when Moana passed away, the Estate of Moana would appear to me to hold complete title to the property, and depending upon what occurred during the probate of her estate—if any—potential claimants to the property may still exist. This is a fact that may preclude summary judgment.

Our research did not identify a clear answer to the question as to whether a ½ interest owner can redeem the entirety of the ownership of the property by redemption. It appears that if HieHie, LLC is successful in redeeming, then they may have only a ½ ownership interest at best.

c. Technical Failure to Include Cost of Deed Recording in Redemption

The statute and case law appear to require that in order to avail itself of the benefits of the statute, the taxpayer must comply with all aspects of the statute. The Complaint, at ¶ 10, cites to the Hawaii Revised Statutes concerning tax deeds and redemption:

§246-60 Same; tax deed; redemption. The tax collector or the tax collector's assistant shall, on payment of the purchase price, make, execute, and deliver all proper conveyances necessary in the premises and the delivery of the conveyances shall vest in the purchaser the title to the property sold; provided that the deed to the premises shall be recorded within sixty days after the sale; provided further that the taxpayer may redeem the property sold by payment to the purchaser at the sale, within one year from the date thereof, or if the deed shall not have been recorded within sixty days after the sale, then within one year from the date of recording of the deed, of the amount paid by the purchaser, together with all costs and expenses which the purchaser was required to pay, including the fee for recording the deed, and in addition thereto, interest on such amount at the rate of twelve per cent a year, but in a case of redemption more than one year after the date of sale by reason of extension of the redemption period on account of late recording of the tax deed, interest shall not be added for the extended redemption period. [L 1932 2d, c 40, pt of §66; RL 1935, pt of §1961; am L 1939, c 221, pt of §7; RL 1945, pt of §5168; am L 1951, c 133, §6; RL 1955, §128-43; HRS §246-60; gen ch 1985]

Although Kirk, as purchaser of the tax deed, apparently has a duty to disclose the redemption amount to the taxpayer (58 H. 53, 564 P.2d 436; 39 H. 378, 381), the amount of recording the tax deed is available to any person who asks the recorder.

It is unclear whether Matson Kelly, or HieHie, LLC tendered the fee for recording the deed in its February 24, 2015 letter. The Complaint, at ¶ 24 also mis-cites to the Maui County Code at "3.148.270". The correct citation is to 3.48.270, which provides as follows:

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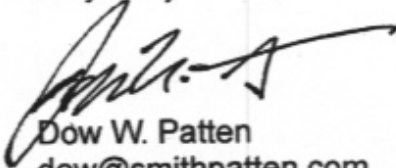
amount at the rate of twelve percent a year, but in a case of redemption more than one year after the date of sale by reason of extension of the redemption period on account of late recording of the tax deed, interest shall not be added for the extended redemption period.

(Ord. 2404 § 1, 1995: Ord. 1076 § 3 (part), 1980: prior code § 6-1.42)

Again, it is unclear whether the fee for recording the deed was included as part of the alleged redemption. If not, this technicality may provide a basis to void the attempt to redeem, making it ineffective, and subject to summary adjudication.

Although I am sure that the foregoing has either been considered by you or at least been on your radar, Kirk requested that I share it with you. If you have any questions or if we can be of any assistance on this end in your representation of Kirk's interests, please do not hesitate to contact us at the numbers and address listed above.

Very Truly Yours,



Dow W. Patten
dow@smithpatten.com