

## Memorandum 2007-18

**Donative Transfer Restrictions: Scope and Methodology of Study**

---

In 1993, the Los Angeles Times printed a series of articles describing the practice of James Gunderson, an Orange County estate planning attorney. Mr. Gunderson represented a large number of elderly people and allegedly violated their trust by drafting estate planning instruments that made large gifts to himself, his family, and his colleagues.

In one case, Gunderson arranged for a blind and bedridden 98-year-old Leisure World man to sign a will and a trust that together bequeathed the attorney \$3.5 million and made the other beneficiaries liable for an estimated \$2 million in inheritance taxes he normally would have incurred.

D. Maharaj, *Assembly OKs Bill to Ban Client Bequests to Lawyers*, Los Angeles Times (July 17, 1993).

In response to those reported abuses, the Legislature enacted Probate Code Section 21350 *et seq.* See 1993 Cal. Stat. ch. 293 (AB 21 (Umberg and Morrow)). The current text of the statute is set out at Exhibit pp. 1-4.

The statute invalidates a transfer to certain types of beneficiaries, where the risk of fraud or undue influence is particularly high (e.g., where the person who drafts an instrument is a beneficiary under the instrument). The invalidation provision is subject to a number of exceptions, including (1) the exemption of certain types of beneficiaries (e.g., a family member), and (2) opportunities to save the instrument through independent attorney certification or judicial determination that the instrument was not procured through fraud or undue influence.

In 2006, the Legislature directed the Commission to study the operation and effectiveness of the statute and to recommend revisions and improvements. See 2006 Cal. Stat. ch. 215 (AB 2034 (Spitzer)); Exhibit pp. 5-6. In addition to that general charge, a number of specific questions are posed. See "Scope of Study," below.

---

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission's report is to be submitted to the Legislature by January 1, 2009. This memorandum begins the study. It describes the various issues that will need to be analyzed and proposes a program of work that should allow the Commission to do a thorough job within the time allotted.

All statutory references in this memorandum are to the Probate Code.

## OVERVIEW OF STATUTE

Section 21350 invalidates a donative transfer to certain types of beneficiaries, unless one of several exceptions applies. It governs both inter-vivos and on-death gifts.

The types of disqualified beneficiaries and the exceptions are summarized below.

### **Disqualified Beneficiaries**

Section 21350 invalidates a donative transfer to any of the following persons:

*Drafter.* The person who drafted the instrument making the donative transfer. Section 21350(a)(1).

*Transcriber.* A person who has a fiduciary relationship with the transferor (including a conservator or trustee) who transcribes the instrument or causes it to be transcribed. Section 21350(a)(3).

*Care custodian.* A person who is a "care custodian" of a transferor who is a "dependent adult." Section 21350(a)(6), (c). The proper scope of this provision is one of the principal issues to be considered in this study.

### **Disqualifying Relationships**

In addition, the statute invalidates a donative transfer to a person who has one of the following relationships to a person described above:

*Blood, marriage, domestic partnership, cohabitation.* A person who is related by blood, marriage, or domestic partnership to a person in one of the three disqualified classes, or is a "cohabitant" of such a person. Section 21350(a)(2), (5), (7). See also Section 21350(b) (degree of relationship).

*Employee.* An employee of a person in one of the three disqualified classes. *Id.*

*Drafter's law firm.* A partner, shareholder, or employee of a "law partnership or law corporation" in which the person who drafted the instrument has an ownership interest. Section 21350(a)(3).

### **Categorical Exceptions**

There are a number of exceptions to the rules stated above. A donative transfer is not invalidated under Section 21350 if any of the following conditions is true:

*Beneficiary related to transferor by blood, marriage, domestic partnership, cohabitation.* The beneficiary is related to the transferor by blood, marriage, or domestic partnership, or is a "cohabitant" of the transferor. Section 21351(a). See also Section 21351(g) (degree of relationship).

*Drafter related to transferor by blood, marriage, domestic partnership, cohabitation.* The person who drafted the instrument is related to the transferor by blood, marriage, or domestic partnership, or is a "cohabitant" of the transferor. *Id.*

*Public or nonprofit entity as beneficiary.* The beneficiary is a government entity or is tax exempt under Internal Revenue Code § 501(c)(3) or (19). Section 21351(f).

*Small gift.* The value of the donative transfer is \$3,000 or less and the total value of the estate is greater than \$100,000. Section 21351(h).

*Nonresident transferor.* The transferor is not a resident of California, was not a resident at the time that the instrument was executed, and the instrument was not signed in California. Section 21351(h).

The term "cohabitant," as used in Section 21351, has the meaning provided in Penal Code Section 13700, governing domestic violence:

[Two] unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship. Factors that may determine whether persons are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same living quarters, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) whether the parties hold themselves out as husband and wife, (5) the continuity of the relationship, and (6) the length of the relationship.

(The term "cohabitant" is not defined for the purposes of Section 21350, but probably should be.)

## **Independent Review**

In addition to the categorical exceptions, an otherwise invalidated transfer can be “saved” by independent review and approval of the following types:

*Independent attorney certification.* The instrument is reviewed by an “independent attorney” who counsels the transferor, attempts to determine whether the instrument is the result of fraud, menace, duress, or undue influence, and signs a written “certificate of independent review” as set out in the statute. The certificate states the attorney’s independence from the transfer and the attorney’s conclusion that the transfer is not the product of fraud, menace, duress, or undue influence. Section 21351(b).

*Substituted judgment.* After full disclosure of the relationships of the persons involved, the court approves the instrument under the general law governing substituted judgment in a conservatorship. Section 21351(c). See also Sections 2580-2586 (substituted judgment).

*Judicial determination of validity.* The court finds, by clear and convincing evidence, that the transfer was not the product of fraud, menace, duress, or undue influence. Section 21351(d). In making this determination, the court may not rely solely on the testimony of a person who is listed as a disqualified beneficiary under Section 21350(a). If the court does not save the transfer, the cost of the proceeding is borne by the disqualified person.

This procedure cannot be used to save either (1) a transfer to the person who drafted the instrument making the transfer, or (2) a transfer in an instrument executed by a California resident who was not a resident at the time of execution.

## **Miscellaneous Provisions**

In addition to the provisions described above, the statute includes a number of miscellaneous provisions relating to the operation of the section. See Sections 21352 (third party liability), 21353 (effect of failed transfer), 21354 (effect of contrary provision in instrument), 21355 (application date), 21356 (statute of limitations).

## SCOPE OF STUDY

### **General Assignment**

AB 2034 directs the Commission to study the “operation and effectiveness” of the statute, with special attention paid to “protecting prospective transferors

from fraud, menace, or undue influence, while still ensuring the freedom of transferors to dispose of their estates as they desire and reward true ‘good Samaritans...’”

AB 2034 also poses several specific questions that the Commission will need to answer. Those questions relate to (1) the disqualification of care custodians, (2) the disqualification of an attorney who drafts an instrument, (3) the procedure for independent attorney certification of a transfer, and (4) the evidence considered by a court in determining that a transfer is not the product of fraud, menace, duress, or undue influence. Those questions are discussed below, along with related issues.

### **Care Custodian**

AB 2034 directs the Commission to study whether the standard for disqualification of a “care custodian” should be stricter:

Whether the potential for abuse by care custodians militates in favor of creating a separate, more restrictive, regulatory scheme for donative transfers to that class and how the common law presumption of undue influence that arises when a person having a confidential relationship with a transferor, who actively participates in the transfer and unduly benefits from it, bears on this.

The Commission should also consider whether the standard should be loosened in some respects:

Whether the definition of “care custodian” contained in subdivision (c) of Section 21350 of the Probate Code should be changed and whether it should include long time family friends, nonprofessional caregivers who have a preexisting relationship with the transferor, or other “good Samaritans.”

Whether donative transfers to care custodians should be invalid if the transferor executes the instrument making the donative transfer within a given period after the relationship between the donor and the care custodian begins.

### **Recent Developments**

In considering the care custodian issues, the Commission will need to take into account two recent developments:

(1) After enactment of AB 2034, the California Supreme Court published a case directly addressing the scope of the term “care custodian” as used in Section 21350. See *Bernard v. Foley*, 39 Cal. 4th 794, 139 P.3d 1196, 47 Cal. Rptr. 3d 248

(2006). In a 4-3 decision overturning prior appellate court decisions, the majority held that there is no exception to the care custodian disqualification provision for a personal friend who provides services informally as a volunteer.

In a separate concurring opinion, Chief Justice George suggests that the Legislature consider modifying the rules governing the disqualification of care custodians:

At the same time, it appears to me that in other, fairly common factual circumstances involving uncompensated caregivers, application of these statutory provisions may disserve the legislative goals implicit in their enactment. Accordingly, notwithstanding our customary and proper reticence in encouraging legislative action, in the present context I believe the Legislature would do well to consider modifying or augmenting the relevant provisions in order to more fully protect the interests of dependent adults and society as a whole, by according separate treatment to longer term care custodians who undertake that role as a consequence of a personal relationship rather than as an occupational assignment.

*Id.* at 816.

(2) Earlier this year, the Assembly Committee on the Judiciary introduced AB 1727. The bill would revise the provision of Section 21350 that disqualifies a care custodian, as follows:

21350. (a) Except as provided in Section 21351, no provision, or provisions, of an instrument shall be valid to make any donative transfer to any of the following:

...

(6) A care custodian of a dependent adult who is the transferor, if the instrument creating or modifying the donative transfer is dated after the date that the person receiving the transfer became the care custodian for that transferor.

In other words, a donative transfer is not invalidated if the beneficiary later becomes the transferor's care custodian.

The Committee explains:

This bill seeks to codify the most straightforward and clear cut of the Chief Justice's suggested changes — that a donative transfer from a dependent adult to his or her caretaker is presumptively valid, as long as the instrument creating or modifying the transfer predates the caregiving. The remainder of the Chief Justice's suggestions, while they appear reasonable, require more policy analysis, and, appropriately, await the CLRC report to the Legislature. That report, which is due by January 1, 2009, will

specifically review the presumptive invalidity of gifts to caregivers and make recommendations to the Legislature on suggested changes. The CLRC will undoubtedly review the *Bernard v. Foley* case and will provide further guidance to the Legislature.

Assembly Committee on Judiciary Analysis of AB 1727 (April 17, 2007).

### **Attorney as Beneficiary**

AB 2034 directs the Commission to consider:

Whether the potential for fraud, menace, or undue influence by a drafting attorney in cases where the drafting attorney, his or her employees, or family, relatives, or any person with a close relationship to the drafting attorney is a transferee, should be addressed in the statute.

The staff is not sure why that question was included. The existing statute invalidates a transfer to the person who drafted the instrument making the transfer or to a person who is closely related to the drafter. See Section 21350(a)(1)-(3). There is no exception for an attorney. It would seem that the law already addresses the concern expressed in the query.

It may be that the Legislature is concerned that an attorney-drafter poses a higher or lower risk than other drafters and therefore should be given different treatment from other drafters. The staff will proceed on the basis of that interpretation, unless some more convincing meaning of the language is found.

### **Independent Attorney Certification**

The existing statute provides a procedure for an “independent attorney” to certify the validity of an otherwise invalidated instrument, thereby saving the transfer from invalidation. Section 21351(b).

AB 2034 directs the Commission to study:

Whether it should be necessary to have a second attorney, rather than the drafting attorney, sign a certificate of independent review in cases in which the drafting attorney is independent of the transferee.

### **Court Validation**

Section 21351(d) provides that a court may save an otherwise invalidated transfer if it determines, by clear and convincing evidence, that the transfer was not the product of fraud, menace, duress, or undue influence.

There is an additional limitation on this process. The court may not base its determination “solely upon the testimony of any person described in subdivision (a) of Section 21350.” Apparently, the testimony of disqualified persons may be considered, but must be buttressed by at least some other evidence. Regarding that limitation, the Legislature directs the Commission to study:

[Whether] the uses of the drafting attorney’s testimony is or should be limited pursuant to subdivision (d) of Section 21351 of the Probate Code, in cases in which that attorney is independent, and if so, whether the statute should be changed accordingly.

Stated in more general terms, is it proper to limit the use of the testimony of a person who is listed in Section 21350(a) but is not, in fact, a beneficiary? For example, a person drafts a will that makes a bequest to a third person, who is entirely unrelated to the drafter. Why should the drafter’s testimony be suspect under those facts?

On a related point, the Legislature asks:

What is or should be the meaning of the phrase “not based solely upon the testimony of any person described in subdivision (a) of Section 21350” contained in subdivision (d) of Section 21351 of the Probate Code, and to what extent there is an actual need for a limitation on testimony.

#### PROPOSED METHODOLOGY

The staff recommends that the Commission address the issues involved in this study in the following order:

- (1) General principles.
- (2) Disqualified persons.
- (3) Categorical exceptions.
- (4) Validation procedures.
- (5) Miscellaneous issues.

The discussion of “general principles” would include an analysis of the purposes served by the various provisions of the existing statute, general commentary on the statute, and the common law that governs the invalidation of a donative transfer for reasons of undue influence. The goal of that analysis would be to identify the contending policies that inform this area of law.



That analysis should provide an analytic framework that the Commission can use in determining whether the various provisions of existing law make sense or should be revised.

The staff invites public comment on the proposed approach and on any problems with existing law that should be brought to the Commission's attention.

Respectfully submitted,

Brian Hebert  
Executive Secretary

Exhibit

---

**PART 3.5. LIMITATIONS ON TRANSFERS TO  
DRAFTERS AND OTHERS  
(PROB. CODE §§ 21350-21356)**

**§ 21350. Invalid transfers**

21350. (a) Except as provided in Section 21351, no provision, or provisions, of any instrument shall be valid to make any donative transfer to any of the following:

(1) The person who drafted the instrument.

(2) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, the person who drafted the instrument.

(3) Any partner or shareholder of any law partnership or law corporation in which the person described in paragraph (1) has an ownership interest, and any employee of that law partnership or law corporation.

(4) Any person who has a fiduciary relationship with the transferor, including, but not limited to, a conservator or trustee, who transcribes the instrument or causes it to be transcribed.

(5) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of a person who is described in paragraph (4).

(6) A care custodian of a dependent adult who is the transferor.

(7) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, a person who is described in paragraph (6).

(b) For purposes of this section, “a person who is related by blood or marriage” to a person means all of the following:

(1) The person’s spouse or predeceased spouse.

(2) Relatives within the third degree of the person and of the person’s spouse.

(3) The spouse of any person described in paragraph (2).

In determining any relationship under this subdivision, Sections 6406, 6407, and Chapter 2 (commencing with Section 6450) of Part 2 of Division 6 shall be applicable.

(c) For purposes of this section, the term “dependent adult” has the meaning as set forth in Section 15610.23 of the Welfare and Institutions Code and also includes those persons who (1) are older than age 64 and (2) would be dependent adults, within the meaning of Section 15610.23, if they were between the ages of 18 and 64. The term “care custodian” has the meaning as set forth in Section 15610.17 of the Welfare and Institutions Code.

(d) For purposes of this section, “domestic partner” means a domestic partner as defined under Section 297 of the Family Code.

**§ 21350.5. “Disqualified person” defined**

21350.5. For purposes of this part, “disqualified person” means a person specified in subdivision (a) of Section 21350, but only in cases where Section 21351 does not apply.

**§ 21351. Exceptions**

21351. Section 21350 does not apply if any of the following conditions are met:

(a) The transferor is related by blood or marriage to, is a cohabitant with, or is the registered domestic partner, pursuant to Division 2.5 (commencing with Section 297) of the Family Code, of the transferee or the person who drafted the instrument. For purposes of this section, “cohabitant” has the meaning set forth in Section 13700 of the Penal Code. This subdivision shall retroactively apply to an instrument that becomes irrevocable on or after July 1, 1993.

(b) The instrument is reviewed by an independent attorney who (1) counsels the client (transferor) about the nature and consequences of the intended transfer, (2) attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and (3) signs and delivers to the transferor an original certificate in substantially the following form, with a copy delivered to the drafter:

“CERTIFICATE OF INDEPENDENT REVIEW

I, \_\_\_\_\_, have reviewed  
(attorney’s name)

\_\_\_\_\_ and counseled my client,  
(name of instrument)

\_\_\_\_\_ on the nature  
(name of client)

and consequences of the transfer, or transfers, of property to:

\_\_\_\_\_ contained in the instrument.  
(name of potentially disqualified person)

I am so disassociated from the interest of the transferee as to be in a position to advise my client independently, impartially, and confidentially as to the consequences of the transfer. On the basis of this counsel, I conclude that the transfer, or transfers, in the instrument that otherwise might be invalid under Section 21350 of the Probate Code are valid because the transfer, or transfers, are not the product of fraud, menace, duress, or undue influence.

\_\_\_\_\_  
(Name of Attorney) (Date) ”

Any attorney whose written engagement signed by the client is expressly limited solely to the preparation of a certificate under this subdivision, including the prior counseling, shall not be considered to otherwise represent the client.

(c) After full disclosure of the relationships of the persons involved, the instrument is approved pursuant to an order under Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 of Division 4.

(d) The court determines, upon clear and convincing evidence, but not based solely upon the testimony of any person described in subdivision (a) of Section 21350, that the transfer was not the product of fraud, menace, duress, or undue influence. If the court finds that the transfer was the product of fraud, menace, duress, or undue influence, the disqualified person shall bear all costs of the proceeding, including reasonable attorney's fees.

(e) Subdivision (d) shall apply only to the following instruments:

(1) Any instrument other than one making a transfer to a person described in paragraph (1) of subdivision (a) of Section 21350.

(2) Any instrument executed on or before July 1, 1993, by a person who was a resident of this state at the time the instrument was executed.

(3) Any instrument executed by a resident of California who was not a resident at the time the instrument was executed.

(f) The transferee is a federal, state, or local public entity, an entity that qualifies for an exemption from taxation under Section 501(c)(3) or 501(c)(19) of the Internal Revenue Code, or a trust holding an interest for this entity, but only to the extent of the interest of the entity, or the trustee of this trust. This subdivision shall retroactively apply to an instrument that becomes irrevocable on or after July 1, 1993.

(g) For purposes of this section, "related by blood or marriage" shall include persons within the fifth degree or heirs of the transferor.

(h) The transfer does not exceed the sum of three thousand dollars (\$3,000). This subdivision shall not apply if the total value of the property in the estate of the transferor does not exceed the amount prescribed in Section 13100.

(i) The transfer is made by an instrument executed by a nonresident of California who was not a resident at the time the instrument was executed, and that was not signed within California.

#### **§ 21352. Third party liability**

21352. No person shall be liable for making any transfer pursuant to an instrument that is prohibited by this part unless that person has received actual notice of the possible invalidity of the transfer to the disqualified person under Section 21350 prior to making the transfer. A person who receives actual notice of the possible invalidity of a transfer prior to the transfer shall not be held liable for failing to make the transfer unless the validity of the transfer has been conclusively determined by a court.

**§ 21353. Effect of invalid transfer**

21353. If a transfer fails under this part, the transfer shall be made as if the disqualified person predeceased the transferor without spouse or issue, but only to the extent that the value of the transfer exceeds the intestate interest of the disqualified person.

**§ 21354. Contrary provision in instrument**

21354. This part applies notwithstanding a contrary provision in the instrument.

**§ 21355. Application of part**

21355. This part shall apply to instruments that become irrevocable on or after September 1, 1993. For the purposes of this section, an instrument which is otherwise revocable or amendable shall be deemed to be irrevocable if on September 1, 1993, the transferor by reason of incapacity was unable to change the disposition of his or her property and did not regain capacity before the date of his or her death.

**§ 21356. Commencement of action**

21356. An action to establish the invalidity of any transfer described in Section 21350 can only be commenced within the periods prescribed in this section as follows:

(a) In case of a transfer by will, at any time after letters are first issued to a general representative and before an order for final distribution is made.

(b) In case of any transfer other than by will, within the later of three years after the transfer becomes irrevocable or three years from the date the person bringing the action discovers, or reasonably should have discovered, the facts material to the transfer.

---

# Assembly Bill No. 2034

## CHAPTER 215

An act relating to donative transfers.

[Approved by Governor September 7, 2006. Filed with  
Secretary of State September 7, 2006.]

### LEGISLATIVE COUNSEL'S DIGEST

AB 2034, Spitzer. Donative transfers.

Existing law provides that, except as specified, no provision or provisions of an instrument are valid to make a donative transfer to certain disqualified persons. Existing law provides that the above provision does not apply if the instrument is reviewed by an independent attorney who counsels the client about the nature and consequences of the intended transfer, attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and signs and delivers to the transferor a certificate of independent review.

This bill would require the California Law Revision Commission to study the operation and effectiveness of provisions restricting donative transfers to certain classes of individuals, and to recommend revisions and improvements to those provisions. The bill would require the commission to report its findings to the Legislature on or before January 1, 2009.

*The people of the State of California do enact as follows:*

SECTION 1. (a) The California Law Revision Commission shall study the operation and effectiveness of the provisions of the Probate Code restricting donative transfers to certain classes of individuals, and shall recommend revisions and improvements to those provisions. The commission shall report all of its findings to the Legislature on or before January 1, 2009.

(b) In considering the overall effectiveness of the current statutory scheme in protecting prospective transferors from fraud, menace, or undue influence, while still ensuring the freedom of transferors to dispose of their estates as they desire and reward true "good Samaritans," the commission shall address the following specific issues:

(1) Whether the potential for abuse by care custodians militates in favor of creating a separate, more restrictive, regulatory scheme for donative transfers to that class and how the common law presumption of undue influence that arises when a person having a confidential relationship with a transferor, who actively participates in the transfer and unduly benefits from it, bears on this.

(2) Whether the provisions concerning gifts to care custodians should be moved to a separate section of the Probate Code.

(3) Whether the definition of “care custodian” contained in subdivision (c) of Section 21350 of the Probate Code should be changed and whether it should include long time family friends, nonprofessional caregivers who have a preexisting relationship with the transferor, or other “good Samaritans.”

(4) Whether it should be necessary to have a second attorney, rather than the drafting attorney, sign a certificate of independent review in cases in which the drafting attorney is independent of the transferee.

(5) Whether the potential for fraud, menace, or undue influence by a drafting attorney in cases where the drafting attorney, his or her employees, or family, relatives, or any person with a close relationship to the drafting attorney is a transferee, should be addressed in the statute. Also, whether the uses of the drafting attorney’s testimony is or should be limited pursuant to subdivision (d) of Section 21351 of the Probate Code, in cases in which that attorney is independent, and if so, whether the statute should be changed accordingly.

(6) What is or should be the meaning of the phrase “not based solely upon the testimony of any person described in subdivision (a) of Section 21350” contained in subdivision (d) of Section 21351 of the Probate Code, and to what extent there is an actual need for a limitation on testimony.

(7) Whether donative transfers to care custodians should be invalid if the transferor executes the instrument making the donative transfer within a given period after the relationship between the donor and the care custodian begins.