

Memorandum 2007-30

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**Donative Transfer Restrictions: General Principles**

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The Commission has been charged with studying the operation and effectiveness of Probate Code Section 21350 *et seq* (hereafter the "Gift Restriction Statute"). See 2006 Cal. Stat. ch. 215 (AB 2034 (Spitzer)).

That statute invalidates a donative transfer to a person in one of the specified relationships to the transferor. Prob. Code § 21350. In broad brush, the disqualified beneficiaries are: (1) the drafter of the donative instrument, (2) a fiduciary of the transferor who transcribes the donative instrument, and (3) the transferor's "care custodian," provided that the transferor is a "dependent adult." There are a number of exceptions. The most important is a blanket exception for a beneficiary who is related to the transferor by blood or marriage or is the cohabitant or domestic partner of the transferor.

An invalidated transfer can be saved if the beneficiary can prove that the gift was not the product of duress, menace, undue influence, or fraud. That fact can be proven in two ways: (1) by the certification of an independent attorney who interviewed the transferor about the transfer, or (2) by clear and convincing evidence in a court proceeding. Prob. Code § 21351.

In effect, the statute operates as a rebuttable presumption of duress, menace, undue influence, or fraud when the beneficiary falls into one of the specified classes of beneficiary. A gift to one of those beneficiaries is automatically invalidated unless the beneficiary can rebut the presumption.

The Commission has been called on to evaluate the effectiveness of the statute. To do so, the Commission will need to make judgments about what facts should (or should not) trigger the statutory presumption. To make those judgments, the Commission will need to understand the general principles that underlie the concepts of menace, duress, undue influence, and fraud.

The purpose of this memorandum is to provide an overview of those matters. The memorandum also includes some preliminary analysis of how existing law

on duress, menace, fraud, and undue influence relates to the Gift Restriction Statute.

This memorandum is primarily informational. It is meant to familiarize the Commission with general policy issues that will arise in analyzing the Gift Restriction statute.

#### DURESS AND MENACE

As noted above, the Gift Restriction Statute operates as a presumption that a gift was procured through one of the improper means listed in the statute. That list includes duress and menace. In order to save a gift that is otherwise disqualified under the statute, the beneficiary must prove that it was not procured through duress or menace (among other things).

#### **Background**

What are duress and menace? The terms have been defined in the Civil Code in connection with contract formation. Civil Code Section 1569 provides:

1569. Duress consists in:

1. Unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband, or wife;
2. Unlawful detention of the property of any such person; or,
3. Confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harrassing (sic) or oppressive.

Civil Code Section 1570 provides:

1570. Menace consists in a threat:

1. Of such duress as is specified in Subdivisions 1 and 3 of the last section;
2. Of unlawful and violent injury to the person or property of any such person as is specified in the last section; or,
3. Of injury to the character of any such person.

Apparent consent that is obtained through duress or menace is not real or free consent. Civ. Code § 1567. A contract obtained through duress or menace is therefore voidable. See Civ. Code § 1566. Similarly, the execution or revocation of a will that is procured by duress or menace is ineffective. Prob. Code § 6104.

The types of coercion that constitute duress and menace involve extreme oppression. It borders on or may actually involve criminal conduct (e.g., kidnapping, blackmail, threatened assault).

## **Analysis**

The staff's preliminary assessment is that the facts that trigger forfeiture under the Gift Restriction Statute have no clear connection to duress or menace. It is untenable to suggest that a beneficiary who drafts a donative instrument, transcribes a donative instrument, or acts as care custodian for a dependent transferor should be presumed to have used duress or menace to procure a gift.

To the extent that the statute requires that a beneficiary prove the absence of duress or menace in order to save a gift, it would appear to be inequitable.

The staff doubts that the statute was really drafted to create a presumption of duress or menace. It seems more likely that because the phrase "duress, menace, fraud, or undue influence" is used as a single concept in many statutes, it was used again in the Gift Restriction Statute, without considering the implications.

**The staff invites input on whether the inclusion of duress and menace in the Gift Restriction Statute serves any purpose (or causes any problems).**

Analysis of the concepts of duress and menace raises another question. Should the facts that trigger the statutory presumption be expanded to include facts that would raise a legitimate presumption of duress or menace?

For example, the statute could be revised to invalidate a gift to any person who has been convicted of an elder abuse offense against the transferor. That fact arguably does create a presumption that a gift to the beneficiary was procured through duress or menace. The Commission need not consider that specific example, as existing law already voids a gift to a person convicted of elder abuse against the transferor. See Prob. Code § 259(b). However, there may be other acts that would serve as reliable indicia of duress or menace. **The staff also invites input on this issue.**

## **UNDUE INFLUENCE**

The Gift Restriction Statute also operates to establish a presumption of undue influence. The staff believes that this is the main purpose of the statute.

The question of what facts are indicia of undue influence is discussed below. Significantly, the common law recognizes a presumption of undue influence when three factors are present together: a "confidential relationship" between

the transferor and beneficiary, active participation by the beneficiary in creating the donative instrument, and the receipt of an “undue benefit” under the instrument. The common law presumption of undue influence has considerable relevance to the scope and effect of the statutory presumption. It is discussed separately below.

## WHAT IS UNDUE INFLUENCE?

Influence, by itself, is not improper and does not invalidate a gift. Only *undue* influence has that effect. What constitutes undue influence?

### Undue Influence in Wills

Probate Code Section 6104 provides that a will procured through undue influence is ineffective, but the Probate Code does not define “undue influence.” However, there is extensive case law exploring the nature of undue influence in procuring a will:

The mere fact that one person has been influenced by the arguments or entreaties of another is not enough to make the influence an undue one. It is not undue unless the pressure has reached a point where the mind of the person subjected to it gives way before it so that the action of such person taken in response to the pressure does not in fact represent his conviction or desire, brought about perhaps by argument and entreaty, but represents in truth but the conviction or desire of another. As was said in *Estate of Donovan*, 140 Cal. 390, 394 [73 Pac. 1081], quoting from Chaplin: “The true test of undue influence is that it overcomes the will without convincing the judgment.”

*In re Anderson’s Estate*, 185 Cal. 700, 707, 198 P. 407 (1921).

Undue influence consists in the exercise of acts or conduct by which the mind of the testator is subjugated to the will of the person operating on it; some means taken or employed which have the effect of overcoming the free agency of the testator and constraining him to make a disposition of his property contrary to and different from what he would have done had he been permitted to follow his own inclination or judgment.

*In re Ricks’ Estate*, 160 Cal. 467, 480, 117 P. 539 (1911).

Those are obviously not bright line tests. However, the courts have recognized a number of evidentiary indicia of undue influence:

The indicia of undue influence have been stated as follow: “(1) The provisions of the will were unnatural. (2) The dispositions of

the will were at variance with the intentions of the decedent, expressed both before and after its execution. (3) The relations existing between the chief beneficiaries and the decedent afforded to the former an opportunity to control the testamentary act. (4) The decedent's mental and physical condition was such as to permit a subversion of his freedom of will. And (5) the chief beneficiaries under the will were active in procuring the instrument to be executed." *In re Estate of Yale*, 214 Cal. 115, 122, 4 P.2d 153, 155.

*In re Lingenfelter's Estate*, 38 Cal. 2d 571, 585, 241 P.2d 990 (1952) (quoting *In re Estate of Yale*, 214 Cal. 115, 122, 4 P.2d 153 (1931)).

The judicially recognized indicia of undue influence are discussed in the next part of the memorandum. See "General Indicia of Undue Influence," below.

Some of those indicia, when present in combination, establish a rebuttable presumption of undue influence. Those indicia are discussed separately. See "Indicia Establishing Common Law Presumption of Undue Influence," below.

### **Undue Influence in Contracting**

In addition to invalidating a will, undue influence can negate the free consent necessary to form a contract. The law provides for rescission of a contract procured through undue influence. See Civ. Code §§ 1550, 1566, 1567. In that context, undue influence is defined as follows:

1575. Undue influence consists:

1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;
2. In taking an unfair advantage of another's weakness of mind; or,
3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.

Civ. Code § 1575.

The principles underlying undue influence in contract formation are similar to those underlying undue influence in the procurement of a will. However, the will situation is the better model for the Gift Restriction Statute, because it involves a unilateral gift rather than a negotiated agreement. For the most part, this memorandum discusses the law governing wills.

## GENERAL INDICIA OF UNDUE INFLUENCE

Several judicially recognized indicia of undue influence in procuring a will are discussed below. None of those indicia is sufficient, on its own, to establish undue influence. However, each may be offered to add evidentiary support, and when several indicia exist in combination, it may be sufficient to prove undue influence.

Note that many of the indicia discussed below are inherently qualitative. That would make it difficult to draft a bright line test for those indicia that could be used to trigger a statutory presumption of undue influence. Consequently, those indicia may be less useful in evaluating the effectiveness of the statute.

### **Unnatural Gift**

#### *Background*

Will contest cases often involve an assertion that the will is “unnatural.” A will may be considered unnatural if it fails to provide for close family members (the “natural objects” of the testator’s bounty), or treats those natural objects unequally. See 64 Cal. Jur. 3d *Wills* § 158 (2007). For example, a will that leaves the entire estate to the transferor’s niece while leaving nothing to the transferor’s children would be considered unnatural. See, e.g., *In re Finkler’s Estate*, 3 Cal. 2d 584, 46 P.2d 149 (1935) (will named husband of niece of transferor’s predeceased spouse as heir, omitted half-sister).

However, a will is *not* considered unnatural if there is a clear reason for what might otherwise be considered an unnatural disposition. 64 Cal. Jur. 3d *Wills* § 163. See, e.g., *In re Finkler’s Estate*, 3 Cal. 2d 584, 46 P.2d 149 (1935) (transferor and his omitted half-sister were estranged).

There is nothing inherently wrong with an unnatural will: “A testator has the right to make an unjust, unreasonable, or even cruel will, and a will cannot legally be set aside for the mere fact that it has such a character.” See 64 Cal. Jur. 3d *Wills* § 157 (2007). It is merely suggestive of the presence of undue influence.

#### *Analysis*

Concern about the “natural objects” of the transferor’s bounty may explain why the Gift Restriction Statute exempts a gift to a family member, spouse, domestic partner, or cohabitant from invalidation. The assumption may be that a gift to such a person is “natural” and should therefore not be presumed to be the product of undue influence.

Concern about the relative size of different beneficiaries' gifts is mostly absent from the statute, the exception being a provision that exempts a small gift from invalidation. See Section 21351(h) (exempting gift of \$3,000 or less, if estate is valued at \$100,000 or more).

In considering how well the statute reflects the "naturalness" of a gift, the Commission might wish to evaluate: (1) Should the family exception apply to any family member, regardless of the remoteness of the connection? (2) Should the amount of the small gift exception be adjusted? (3) Should the statute involve any kind of comparison of the value of the gift at issue to other gifts given to family members? The last point would be very difficult to capture in a statutory rule, as it involves a qualitative judgment.

The Commission will also need to decide whether there should be an exception for a "friend" of the transferor, especially in the context of the care custodian relationship. Such an exception would be based on the notion that a close or long time friend is a natural object of a person's bounty.

## **Inconsistency with Expressed Intentions**

### *Background*

If a disposition in a will differs significantly from the testator's prior expressions of testamentary intent, that difference may be evidence of undue influence. See 64 Cal. Jur. 3d *Wills* § 183 (2007). For example, it may be evidence of undue influence if a transferor executes a will that provides nothing for two of her four children and none of her grandchildren, despite having stated to witnesses that she wanted all of her children and grandchildren to share in her estate. *In re Rabinowitz' Estate*, 58 Cal. App. 2d 106, 135 P.2d 579 (1945).

### *Analysis*

The issue of inconsistency with expressed intentions involves a qualitative comparison that would be difficult to reduce to a bright line rule.

However, there is one issue relating to consistency that could perhaps be addressed. Suppose that a transferor's will makes a gift to a friend. Later, that friend drafts a new will for the transferor (which repeals the first will). The new will continues the gift that was created in the first will. Should the gift in the new will be invalidated merely because the beneficiary drafted that instrument? Arguably not. The Commission could propose a new statutory exception to address that sort of situation. However, it may not be necessary. Even if the

presumption operates on those facts, it would seem to be a simple matter for the beneficiary to prove that the gift was not the result of undue influence by the beneficiary. The gift would then be saved.

### **Opportunity to Exert Undue Influence**

#### *Background*

The fact that a beneficiary had an opportunity to exercise undue influence on a transferor may be offered as circumstantial evidence of undue influence. See 64 Cal. Jur. 3d *Wills* § 187 (2007). For example, where a beneficiary lived alone with the transferor after her husband's death, that opportunity to influence the transferor might be offered as evidence of undue influence. See *In re Welch's Estate*, 43 Cal. 2d 173, 272 P.2d 512 (1954).

However, given the high degree of influence required for undue influence, mere proof of opportunity is far from sufficient to establish undue influence:

[Mere] opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient. ... "The unbroken rule in this state is that courts must refuse to set aside the solemnly executed will of a deceased person upon the ground of undue influence unless there be proof of 'a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made.'"

*See* 64 Cal. Jur. 3d *Wills* §§ 175-76 (citations omitted).

#### *Analysis*

The opportunity to exert influence is probably one factor in the Gift Restriction Statute's invalidation of a gift to a care custodian of a dependent adult. A care custodian will often spend considerable amounts of time alone with the transferor, providing an opportunity to exert influence.

The Commission should consider whether there are any other easily defined relationships that would provide a sustained opportunity to exert influence.

### **Testator's Capacity to Resist Undue Influence**

#### *Background*

Undue influence is influence that overwhelms the transferor's will. The amount of influence required to achieve that result will vary with the transferor's ability to resist influence.

If a transferor is peculiarly pliable, the likelihood of undue influence is greater and therefore easier to prove. If the transferor has a strong mind and will, then undue influence is less likely and therefore harder to prove. See 64 Cal. Jur. 3d *Wills* § 188 (2007).

Thus, the court did not find undue influence where:

[The] testatrix was at all times, even up to the time of her death, a woman of strong mental and physical powers. She was highly educated, a woman of strong and decided mind; positive in her ideas and opinions. Contestant himself testified that he was not prepared to say that his mother was of a yielding, pliant disposition, and could be influenced by anybody; she might be, to save trouble, but it would have to be some strong reason, some strong persuasive force, and that he could not give a single instance where his mother was compelled to do anything which she did not want to do against her will.

*In re Ricks' Estate*, 160 Cal. 467, 478, 117 P. 539 (1911).

#### *Analysis*

Vulnerability to influence is probably also a factor in the Gift Restriction Statute's invalidation of a gift to a care custodian of a dependent adult. A person who is in a position of dependence on another may be peculiarly vulnerable to influence by that person. This may be especially true if the condition giving rise to the dependent relationship involves some diminishment of physical or cognitive health.

The Commission should consider whether there are any other easily defined circumstances that would make a person unusually vulnerable to influence.

### **Opportunity to Change Will**

#### *Background*

If a significant amount of time passes between execution of a donative instrument and its operation, and the transferor is competent to revoke or change the instrument during that time, it is less likely that the instrument was a product of undue influence. Conversely, if the instrument was executed on the deathbed, there may be a heightened suspicion of undue influence. See 64 Cal. Jur. 3d *Wills* § 190 (2007).

### *Analysis*

The Gift Restriction Statute does not directly address this issue. The Commission should consider whether there should be an exception to invalidation for a gift if the transferor has had a significant opportunity to revoke it. For example, it might be appropriate to add an exemption in the following circumstances:

- (1) A specified period of time has passed since the execution of the instrument making the gift, during which the transferor was competent to revoke the gift and free from the circumstance that gave rise to the presumption of undue influence.
- (2) A gift that triggers the statutory presumption is not revoked by a subsequent amendment of the donative instrument (provided that the amendment itself doesn't trigger the statutory presumption).

## **Independent Advice**

### *Background*

If the transferor was isolated from independent sources of advice at the time that the instrument is created, that may be evidence of undue influence. Conversely, if the transferor had independent access to an attorney or other advisers, it is less likely that the instrument was the product of undue influence. See 64 Cal. Jur. 3d *Wills* § 191.

### *Analysis*

The Gift Restriction Statute does not directly address this issue. That is not surprising, as it would be difficult to reduce this question to a bright line test.

## **Misrepresentation**

### *Background*

If the influence that is brought to bear on the transferor includes misrepresentations, that may be evidence of undue influence. However, the use of misrepresentations does not necessarily constitute undue influence. The question is whether misrepresentation is used in such a way as to subjugate the transferor's will with respect to the donative instrument. See 64 Cal. Jur. 3d *Wills* § 193-94.

### *Analysis*

The Gift Restriction Statute does not require a showing of misrepresentation to trigger the statutory presumption. The question of whether misrepresentations would rise to the level to constitute undue influence cannot be reduced to a bright line test. It would depend on the nature of the misrepresentation and the extent to which the transferor relied on it in making the gift.

## **Fomenting Estrangement**

### *Background*

Evidence that a person charged with exerting undue influence acted to foment estrangement between the transferor and other potential heirs may be evidence of undue influence. See 64 Cal. Jur. 3d *Wills* § 196.

### *Analysis*

This indicia is also inherently qualitative and cannot easily be reduced to a statutory test. The Gift Restriction Statute does not address the issue.

## **Spiritualist Advisor**

### *Background*

The influence exerted by a spiritualist advisor over a person seeking advice may create an unusual opportunity for undue influence. See 64 Cal. Jur. 3d *Wills* § 206. It may also be that a person who seeks such counsel may be unusually vulnerable to the influence of the advisor.

### *Analysis*

Historically, this indicia has arisen in the context of purported spirit mediums, psychics, and the like. In theory, it might be possible to identify that class with sufficient specificity for a bright line test.

However, the staff is concerned that such an approach would stray into unconstitutional territory. It would be difficult to draw a clear distinction between an authentic spiritual advisor and a charlatan. In the absence of such a distinction, a statute that creates a presumption of undue influence for a gift to a “spiritualist advisor” might impair the free exercise of religion by singling out gifts to religious persons or entities for special deleterious treatment.

The staff recommends that the issue be left to the common law. In cases of obvious abuse there should be enough evidence for the court to find undue influence without a statutory presumption.

## INDICIA ESTABLISHING COMMON LAW PRESUMPTION OF UNDUE INFLUENCE

In addition to the general evidentiary indicia described above, there are three indicia that, when present together, establish a rebuttable presumption of undue influence. When the presumption is established, the burden shifts to the will's proponent. The proponent must then prove, by a preponderance of the evidence, that the will was not the product of undue influence. See *Sarabia v. Gibbs*, 221 Cal. App. 3d 599, 605, 270 Cal. Rptr. 560 (1990); 64 Cal. Jur. 3d *Wills* § 224 (2007).

The indicia establishing the common law presumption of undue influence are: (1) the existence of a confidential relationship between the transferor and the beneficiary, (2) the participation of the beneficiary in the creation of the will, and (3) an undue profit to the beneficiary. See *Rice v. Clark*, 28 Cal. 4th 89, 97, 47 P.3d 300, 120 Cal. Rptr. 2d 522 (2002). Those indicia are discussed below.

### **Confidential Relationship**

#### *Background*

One treatise describes the confidential relationship as follows:

For purposes of the presumption of undue influence, a confidential relationship exists whenever one person reposes trust and confidence in the integrity and fidelity of another. It exists between the decedent and members of the decedent's immediate family; attorney and client; guardian and ward; the decedent and a business adviser; the decedent and a person who represented the decedent as an agent for the decedent's artistic affairs; and the decedent and the person who prepared the decedent's will. It does not necessarily exist between nurse and patient. And although the doctor-patient relationship is a confidential one, it is not in itself sufficient to substantiate a claim that a will, by which the decedent left her whole property to a physician attending her at the hospital of which she was an inmate at the time of the will's execution and where she died within a month, was procured by undue influence.

The mere fact that a person is named executor is not sufficient to establish a confidential relationship to the testator, nor is it enough that a person is named executor-trustee. Close friendship may, but does not necessarily, create a confidential or fiduciary relationship, nor does an illicit sexual relation.

64 Cal. Jur. 3d *Wills* § 213 (2007) (footnotes omitted).

A gift to the transferor's attorney raises a special risk of undue influence, because the attorney-client privilege is both confidential and fiduciary. If an attorney drafts a will that names the attorney as executor and beneficiary, the court may raise the presumption of undue influence on its own motion. *Estate of Lind*, 209 Cal. App. 3d 1424, 1436-37, 257 Cal. Rptr. 853 (1989) ("Such exercises of undue influence by attorneys are especially egregious and thus require the closest scrutiny.").

While a close family relationship can constitute a confidential relationship, kinship alone does not necessarily prove the existence of a confidential relationship. See 64 Cal. Jur. 3d *Wills* § 215 (2007).

#### *Analysis*

The concept of the confidential relationship includes objectively determinable relationships. The Gift Restriction Statute treats two of those relationships (the person who drafts the instrument and a fiduciary who transcribes the instrument) as grounds for the statutory presumption of undue influence. Arguably, that is a reflection of the common law concern that those in a confidential relationship pose a special risk of undue influence. However, it seems equally likely that inclusion of those grounds simply reflects the historical development of the statute, which was prompted by reports of abuse by an attorney who drafted donative instruments benefiting himself.

The care custodian relationship might also give rise to a confidential relationship, but it is not clear that it necessarily would. Such a relationship could exist without the transferor relying on the care custodian's integrity and fidelity, especially as to significant financial matters.

There are no other confidential relationships singled out in the Gift Restriction Statute. That may be because some persons in a confidential relationship may also be a natural object of the transferor's bounty (e.g., the transferor's close family member or guardian). That would tend to undermine any suspicion of undue influence that otherwise might arise from the relationship.

#### *Special Concern Regarding Attorney-Client Relationship*

There is one type of confidential relationship, the attorney-client relationship, which might warrant special treatment under the statute. As noted above, the common law considers the attorney-client relationship to present a heightened

risk of abuse of the confidential relationship. A court may raise the issue of undue influence of an attorney-beneficiary on its own motion.

Additionally, as discussed below, a gift to an attorney is always deemed to constitute undue benefit for the purposes of establishing the common law presumption of undue influence.

What's more, the Legislature specifically instructed the Commission to examine the statute's treatment of attorneys. See 2006 Cal. Stat. ch. 215.

For all of the reasons discussed above, the Commission should consider whether any gift to the transferor's attorney should trigger the statutory presumption of undue influence (unless the gift is otherwise exempted, e.g., the attorney is also a family member).

Note finally, that the Gift Restriction Statute already provides one special rule for attorneys. If an attorney drafts the donative instrument, a gift to a partner or shareholder of the attorney's law firm will trigger the statutory presumption. It isn't clear why that rule should be limited to partners and shareholders of a law firm, but not other business interests held by the beneficiary. It also isn't clear why the business partner rule shouldn't be extended to the other presumptively disqualified beneficiaries (e.g., a fiduciary who transcribes a donative instrument). One of the general goals in this study should be to make the various rules in the Gift Restriction Statute operate more uniformly, unless there is a good policy reason for differing treatment.

## **Active Participation in Procuring Will**

### *Background*

The second of the two indicia establishing the common law presumption of undue influence is the beneficiary's active participation in procuring the will. Active participation can take a number of forms, including attending the meeting between the transferor and the drafting attorney, influencing the selection of the drafting attorney, giving instructions to the drafting attorney, or drafting or transcribing the will. See 64 Cal. Jur. 3d *Wills* §§ 197-99.

### *Analysis*

The Gift Restriction Statute squarely addresses this issue. The statutory presumption is triggered when a gift is made to the person who drafted the donative instrument, or to a fiduciary of the transferor who transcribes the

donative instrument. Other forms of active participation are not included as events triggering the presumption.

It might be possible to expand the grounds for the statutory presumption, to include other types of active participation. However, the concept of “active participation” may be too qualitative to reduce to a bright line rule. How much participation is too much participation? For example, suppose that a beneficiary recommends an attorney to the transferor, but takes no other part in preparing the donative instrument. Should that trigger the presumption? Or suppose that the transferor asks the beneficiary to attend the meeting with the attorney. The beneficiary attends the first part of the meeting, but steps out of the room so that the transferor and beneficiary can conclude the meeting privately. Should that trigger the presumption?

## **Undue Profit**

### *Background*

The question of whether a person’s profit under a will is “undue” is inherently qualitative and is related to the concept of whether a will is “unnatural”:

If the trier of fact is empowered to check for “unnatural” provisions of the will as an indicator of undue influence ..., it follows as a matter of simple corresponding logic that the trier is empowered to decide what would constitute natural provisions. To determine if the beneficiary’s profit is “undue” the trier must necessarily decide what profit would be “due.” These determinations cannot be made in an evidentiary vacuum. The trier of fact derives from the evidence introduced an appreciation of the respective relative standings of the beneficiary and the contestant to the decedent in order that the trier of fact can determine which party would be the more obvious object of the decedent’s testamentary disposition.

See *Estate of Sarabia*, 221 Cal. App. 3d 599, 607, 270 Cal. Rptr. 560 (1990) (citations omitted).

In *Sarabia*, the court upheld an instruction to the jury that “undue profit” is a gift that is “unwarranted, excessive, inappropriate, unjustifiable or improper.” *Id.* at 604.

When the beneficiary is the transferor’s attorney, any gift to the attorney is deemed to be undue for the purpose of establishing the common law presumption of undue influence. See 64 Cal. Jur. 3d *Wills* § 221.

## *Analysis*

The Gift Restriction Statute does not consider the magnitude of the gift (except by providing a small gift exception to invalidation). Given the inherently qualitative nature of this indicia, it would be difficult for a statute to capture the concept of undue profit.

### **Special Note on Burden of Proof in Rebutting Presumption**

Once triggered, the common law presumption requires that the proponent of the will prove, *by a preponderance of evidence*, that the will was not procured through undue influence.

By contrast, the Gift Restriction Statute requires that the proponent of an otherwise invalidated transfer prove, *by clear and convincing evidence*, that the gift was not procured through undue influence. Prob. Code § 21351(d).

That seems odd. The statutory presumption is easier to establish than the common law presumption, but is harder to rebut. **The staff invites comment on whether those differing standards for rebutting a presumption of undue influence make sense.**

## FRAUD

In order to save a gift that is invalidated under the Gift Restriction Statute, the proponent must prove to the court (or an independent attorney must certify) that the gift was not the product of menace, duress, undue influence, *or fraud*. Prob. Code § 21351(b) & (d). Thus, the statute also operates as a presumption of fraud. What is fraud?

### **Background**

Civil Code Sections 1572 defines “actual fraud” in the context of contract formation:

1572. Actual fraud, within the meaning of this Chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

3. The suppression of that which is true, by one having knowledge or belief of the fact;
4. A promise made without any intention of performing it; or,
5. Any other act fitted to deceive.

In addition, Civil Code Section 1573 defines “constructive fraud”:

1573. Constructive fraud consists:

1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or,
2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

A will may be contested on the grounds of fraud. Prob. Code § 6104. The Civil Code definition of fraud has been applied in will contests. See 64 Cal. Jur. 3d *Wills* § 167 (2007).

There is some overlap between the grounds of fraud and undue influence in contesting a will. Deceit may be used in the exertion of undue influence, and even in the absence of affirmative deceit, undue influence might be described as working a constructive fraud against a transferor’s other heirs:

Fraud is in its nature closely allied to undue influence, and in many cases ... it is practically impossible to distinguish the two, as the same evidence often tends to support each charge. The confusion is increased by the theory sometimes expressed by the courts that undue influence is to be treated as a kind of constructive fraud. But, while allied to undue influence, fraud is not the same thing. *Undue influence is essentially overpowering the will; fraud is deceit.*

*In re Ricks’ Estate*, 160 Cal. 467, 482, 117 P. 539 (1911) (citations omitted) (emphasis added).

Setting aside the question of whether undue influence is itself a species of fraud, in order to contest a will on the grounds of fraud the contestant must prove that the fraud “procured” the will:

- The misrepresentations must have been made with specific intent to deceive the testator.
- The testator must have believed and acted on the fraudulent representations in making the will.

64 Cal. Jur. 3d *Wills* § 170-71 (2007).

## **Analysis**

The grounds for invalidation of a gift under the Gift Restriction Statute do not necessarily involve fraud. None of the provisions of the statute expressly requires evidence of misrepresentation or deceit. The statute seems to be primarily focused on the problem of undue influence.

However, fraud and undue influence are somewhat intertwined. They can arise from the same facts, and it may be difficult to distinguish between them.

For that reason, it probably makes sense for the Gift Restriction Statute to operate as a presumption of both fraud and undue influence. To distinguish between the two grounds for invalidation of a gift would be difficult or pointless in some cases and might invite hair-splitting defenses that could not be made under the current statute.

## **CONCLUSION**

With the information and analysis provided above, the Commission should be ready to begin evaluating the various elements of the Gift Restriction Statute. The next memorandum will consider the grounds for the statutory presumption, including exceptions to those grounds.

Respectfully submitted,

Brian Hebert  
Executive Secretary