

First Supplement to Memorandum 2007-30

Donative Transfer Restrictions: Witness as Beneficiary

In addition to the information provided in Memorandum 2007-30, the staff would like to report one additional basis for a presumption of menace, duress, fraud, or undue influence in the formation of a will. All statutory references in this memorandum are to the Probate Code.

Section 6112 provides:

6112. (a) Any person generally competent to be a witness may act as a witness to a will.

(b) A will or any provision thereof is not invalid because the will is signed by an interested witness.

(c) Unless there are at least two other subscribing witnesses to the will who are disinterested witnesses, the fact that the will makes a devise to a subscribing witness creates a presumption that the witness procured the devise by duress, menace, fraud, or undue influence. This presumption is a presumption affecting the burden of proof. This presumption does not apply where the witness is a person to whom the devise is made solely in a fiduciary capacity.

(d) If a devise made by the will to an interested witness fails because the presumption established by subdivision (c) applies to the devise and the witness fails to rebut the presumption, the interested witness shall take such proportion of the devise made to the witness in the will as does not exceed the share of the estate which would be distributed to the witness if the will were not established. Nothing in this subdivision affects the law that applies where it is established that the witness procured a devise by duress, menace, fraud, or undue influence.

That presumption does not arise if the will qualifies as a holographic will. *In re Reynolds' Estate*, 94 Cal. App. 2d 851, 855, 211 P.2d 608 (1949). A holographic will does not need be witnessed. See Section 6111(a) (will, whether witnessed or unwitnessed, is valid as holographic will if signature and material provisions are in handwriting of testator).

The presumption in Section 6112 is similar to the presumption in Section 21350. However, there are significant differences.

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). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

Comparison

In some ways, Section 6112 is more relaxed than Section 21350:

- (1) Section 6112 does not require clear and convincing evidence to rebut the presumption. Section 21351 does.
- (2) Section 6112 provides a general exemption for a devise made solely in a fiduciary capacity. **The staff invites comment on the circumstances in which a fiduciary would execute a donative instrument on behalf of a transferor.** One example would be a will executed by a conservator on behalf of the conservatee. That specific situation is also exempted from the Gift Restriction statute. See Section 21351(c).
- (3) Section 6112 allows the witness to take whatever part of the estate the witness would have taken if the will did not exist (either under a prior instrument that was revoked by the problematic will, or by intestacy).

By contrast, Section 21353 only allows a disqualified beneficiary to take a share equal to what the beneficiary would have received in intestacy. When analyzed, that rule is even stricter than it first appears. The only beneficiary who would be entitled to an intestate share is a person related to the transferor by blood, marriage, or domestic partnership. See Sections 6401-6402. Almost all such persons are exempt from Section 21350. See Section 21351(a) & (g). Therefore, in almost all cases, a person whose gift is invalidated under Section 21350 has no right to an intestate share and will take nothing.

In other ways, Section 6112 is stricter than Section 21350. Section 6112 does not provide an exception for the transferor's relatives or for small gifts. Nor is there a procedure for saving the will through independent attorney certification that it was not the product of menace, duress, fraud, or undue influence.

Analysis

The similarities between Section 6112 and 21350 suggest that it might be appropriate to consolidate the two sections and provide for more uniform treatment of the related issues. If nothing else, the differences between the two sections raise some interesting questions that the Commission should consider in evaluating the Gift Restriction statute:

- (1) Should a disqualified beneficiary take any part of the estate?
- (2) Should failure to rebut the presumption affect only the disqualified beneficiary's gift, or should the entire instrument be invalidated?

- (3) Are there situations, other than a conservatorship, in which a fiduciary will execute a donative instrument on behalf of another? If so, should such an instrument be exempt from invalidation under Section 21350?

Respectfully submitted,

Brian Hebert
Executive Secretary