Study L-622 February 8, 2008

Memorandum 2008-10

Donative Transfer Restrictions: Disqualified Person

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

Earlier memoranda in this study provided an overview of the Donative Transfer Restriction Statute (Memorandum 2007-18) and discussed general principles underlying the statute (Memorandum 2007-30 and its First Supplement).

This memorandum begins close analysis of the statute's provisions, with examination of the provisions determining who is a "disqualified person." A copy of the existing statute is attached as an exhibit.

Except as otherwise indicated, statutory references in this memorandum are to the Probate Code.

DISQUALIFIED PERSONS GENERALLY

The Donative Transfer Restriction Statute operates as a statutory presumption that a gift to a "disqualified person" was the product of menace, duress, fraud, or undue influence. General issues involving the meaning of "disqualified person" are discussed below.

Existing Categories

Existing Section 21305(a) recognizes four types of "disqualified person":

(1) A beneficiary of a gift who drafts the instrument making the gift.
(2) A beneficiary of a gift who is a fiduciary of the transferor and who either transcribed the instrument making the gift or caused it to be transcribed.
(3) A "care custodian" of a transferor who is a "dependent adult," as those terms are specially defined.

(4) A person in a specified relationship to a person in one of the first three categories.

This memorandum discusses categories (1), (2), and (4).

Category (3), the care custodian, presents a number of difficult and controversial policy issues and will be the subject of a separate memorandum.

Exceptions

The Donative Transfer Restriction Statute includes a number of specific exceptions. See Section 21351. Most notably, a gift to a close family member of the transferor is never invalidated by the statute. The statutory exceptions will be discussed in a later memorandum.

Interested Witness

Existing Section 6112 is substantively similar to Section 21350. Section 6112 establishes a rebuttable presumption of menace, duress, fraud, or undue influence, when a will makes a gift to a necessary witness of the will.

There are differences in how Sections 6112 and 21350 operate, but the two address the same fundamental issue and **should be coordinated**.

Issues involving an interested witness will be discussed in a separate memorandum.

Menace and Duress

Section 21305 establishes a presumption of menace, duress, fraud, or undue influence. The same is true of Section 6112.

As discussed in Memorandum 2007-30, at pages 2-3, it doesn't make sense for the facts described in Sections 6112 or 21350 to establish a presumption of menace or duress.

"Menace" and "duress" are defined terms that describe extreme sorts of misconduct, much of it criminal (e.g., kidnapping, theft, and threatened physical assault). See Civil Code §§ 1569-1570.

There is no logical reason to presume that a gift to a witness, drafter, transcriber, or care custodian is the product of menace or duress. **The staff recommends that references to menace and duress be deleted from the Donative Transfer Restriction Statute.**

Section 21350(a)(1) provides that the "person who drafted the instrument" is a disqualified person.

That is consistent with one of the three elements that establish the common law presumption of undue influence, active participation in procuring the donative instrument. See Memorandum 2007-30, p. 12.

However, under the common law, that fact alone is not enough to establish a presumption of undue influence. It must also be shown that the drafter was in a "confidential relationship" with the transferor and received "undue profit" under the donative instrument. *Id.*

Confidential Relationship

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).

Section 21350 does not require that a drafter be in a confidential relationship with the transferor in order to be a disqualified person. The fact of drafting the instrument is sufficient.

Undue Profit

The common law presumption of undue influence also requires that a gift to a suspect beneficiary be so large as to constitute "undue profit." That concept is closely related to the concept of an "unnatural gift."

To determine whether a gift is unnatural or undue, one must consider the size of the gift in light of the relationship between the beneficiary and the transferor. There is effectively a presumption that a transferor will make larger gifts to persons who are more closely related, and will give roughly the same size gifts to persons who stand in the same degree of relation. That presumption can be overcome if it is shown that the transferor had a good reason to give what otherwise might appear to be an "unnatural" gift. See Memorandum 2007-30, pp. 6-7, 15-16.

The question of whether a gift is unnatural or undue is inherently a judgment call. It would be very difficult to reduce to a bright line rule.

Section 21350 does not require that a gift to a drafter be undue in order for the drafter to be a disqualified person. The fact of drafting the instrument is sufficient.

Discussion

If we were writing on a blank slate, based only on the common law governing proof of undue influence, the single fact that a beneficiary drafted the donative instrument would not be enough to justify a presumption of undue influence.

However, we are not writing on a blank slate. The Donative Transfer Restriction Statute has been in place for 15 years. Under that statute, the drafter is a disqualified person.

The Legislature has chosen to add a statutory overlay, on top of the common law presumption, which is "structured to be more absolute in certain respects, but narrower in the persons targeted." *Rice v. Clark*, 28 Cal. 4th 89, 103, 47 P.3d 300, 120 Cal. Rptr. 2d 522 (2002). It arose out of concern about concrete cases of elder financial abuse and was clearly designed to prevent similar abuse. **The staff sees no basis for second-guessing that fundamental policy choice and recommends against making any substantive change to Section 21305(a)(1).**

THE FIDUCIARY TRANSCRIBER

Section 21350(a)(4) presumptively invalidates a gift to:

> 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.

The meaning of that provision has been construed in *Rice v. Clark*, 28 Cal. 4th 89, 47 P.3d 300, 120 Cal. Rptr. 2d 522 (2002). The court relied in part on dictionary definitions of the term "transcribe," noting that there was no reason to believe that the Legislature intended a special meaning of the word:

> "Transcribe" is, in the present context at least, clear enough in meaning: "To make a copy of (something) in writing; to copy out from an original." (18 Oxford English Dict. (2d ed. 1989) p. 392; see also Webster's 3d New Internat. Dict. (1981) p. 2426 ["1 a: to make a written copy of ... [;] b: to make a copy of (dictated or recorded matter) in longhand or esp. on a typewriter"]; Black's Law Dict. (7th ed. 1999) p. 1503 ["To make a written or typed copy of (spoken material, esp. testimony)"].) Neither party proposes a meaning different from this, or suggests the Legislature used the term in any way other than its ordinary meaning.

Rice v. Clark, 28 Cal. 4th at 101.

The more difficult question is what is meant by a person who "*causes*" an instrument to be transcribed?

That question was also at issue in *Rice v. Clark*. The court agreed with the holding of *Estate of Swetmann*, 85 Cal. App. 4th 807, 102 Cal. Rptr. 2d 457 (2000), that "a person who causes the document to be transcribed is one who directs the drafted document to be written out in its final form and, like the transcriber, is in a position to subvert the true intent of the testator." *Rice v. Clark*, 28 Cal. 4th at 101-02.

In *Swetmann*, the beneficiary was the transferor's conservator. At the transferor's request, he arranged for a trust preparation company to meet with the transferor to prepare an estate plan. He provided information to the trust company about the transferor's assets. He paid for the trust company's services, as the transferor's conservator, using the transferor's funds. Literally speaking, he "caused" the transcription of the transferor's estate plan. However, he had no direct involvement in the preparation of the terms of the plan and was not in a position to affect its content. The court held that, for the purposes of Section 21350, the conservator had not caused the estate plan to be transcribed. See *Estate of Swetmann*, 85 Cal. App. 4th 807, 819-822, 102 Cal. Rptr. 2d 457 (2000).

Rice v. Clark presented similar facts, with a similar result:

> Clark did not direct or oversee, or otherwise participate directly in, the will's or trust's transcription. Both instruments were transcribed by Hardy's secretary at Hardy's direction. Clark facilitated the instruments' preparation and execution by giving Hardy's office a list of Clare's assets that were to be placed in the trust, and by arranging appointments for Clare and driving her to them. He urged Hardy's secretary to prepare the documents promptly after the May 4, 1995, meeting. He encouraged Clare to execute the will and trust after she initially balked at doing so on June 14, 1995. Clark was present at meetings where the disposition of Clare's estate was discussed, but he did not direct Hardy, or anyone else, to include any particular gifts or other provisions in the instruments. In short, Clark materially assisted Clare to dictate the contents of her will and trust to an attorney and to execute the instruments drafted by the attorney, but did not himself directly participate in transcribing the instruments.

Rice v. Clark, 28 Cal. 4th at 105.

Given that the existing language has been definitively construed by the California Supreme Court, **it should probably be preserved as is.** The standard is a bit vague, effectively requiring court review to determine whether conduct rises to the level of "causing" transcription of an instrument, but the resulting standard seems proper. There is no evidence that it is causing problems in practice.

Confidential Relationship

The requirement that a transcriber also be a "fiduciary" of the transferor in order to be a "disqualified person" is consistent with the common law presumption of undue influence (which requires a confidential relationship between a transferor and beneficiary).

Reliance on the concept of a "fiduciary" relationship would exclude some non-fiduciary confidential relationships (e.g., a close familial relationship). However, close family members are already exempt from disqualification under the proposed law. See Section 21351(a). With that exception carved out, the requirement of a "fiduciary" relationship covers most of the remaining scope of the term "confidential relationship." It also has the advantage of providing a fairly bright line rule.

An argument could be made that the drafter and transcriber should be subject to the same rule with respect to the fiduciary requirement. Either the fiduciary relationship should be required for both or it should be required for neither.

However, transcribing arguably presents less opportunity for subversion of an instrument than drafting. A drafter has more direct control. That is especially true for a person who merely "causes" an instrument to be transcribed by another. That difference in control may justify the differential treatment in the existing statute.

What's more, the existing distinction between drafters and transcribers represents a clear legislative policy choice. When Section 21350 was originally enacted in 1993, it presumptively disqualified any of the following persons:

> 21305. (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) A person, including an attorney, conservator, or other person having a fiduciary relationship with the transferor, who drafted, transcribed, or caused to be drafted or transcribed, the instrument.
>
> …

1993 Cal. Stat. ch. 293. Under that language, any "person" (including a person who is not a fiduciary) could be disqualified for either drafting or transcribing an instrument.

The section was amended in 1995. See 1995 Cal. stat. ch. 730. It now provides clearly that a drafter *need not* be a fiduciary to be disqualified, but a transcriber *must* be a fiduciary to be disqualified. **The staff sees no reason to second-guess that clearly intentional policy distinction.**

Undue Benefit

The Donative Transfer Restriction Statute does not require any showing of undue benefit in order to treat a fiduciary transcriber as a disqualified person.

Discussion

The presumptive disqualification of a fiduciary transferor is substantially consistent with the common law presumption of undue influence. A fiduciary transcriber is involved in the preparation of the donative instrument and has a confidential relationship with the transferor. The only missing element of the common law presumption is the proof of undue benefit. As discussed above, it would be difficult to codify a clear and easily administered standard for undue benefit. **The staff recommends against making any substantive change to Section 21305(a)(4).**

THE ASSOCIATED BENEFICIARY

The Donative Transfer Restriction Statute does not just disqualify a drafter or fiduciary transcriber. It also disqualifies a relative or other close associate of the drafter or transcriber. That closes a significant loophole. Without that sort of disqualification by association, a person could escape the effect of the statute by colluding with a close associate.

It is not surprising that the Legislature thought to close that loophole, as the abuse that prompted the original statute involved an attorney who drafted wills that made large gifts to himself, his family members, and colleagues in his law firm.

The staff believes that the disqualification of associated beneficiaries is good policy and does not recommend any fundamental change to that rule. However, there are several technical issues that need to be addressed. They are discussed below.

Related by Blood or Marriage

Existing law disqualifies a person who is "related by blood or marriage" to a drafter or fiduciary. Section 21350(b) defines that relationship as follows:

> (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.

(The sections referenced in the final paragraph provide special rules of construction governing "half-blood" relations, posthumous children, adopted children, step children, and children born out of wedlock.)

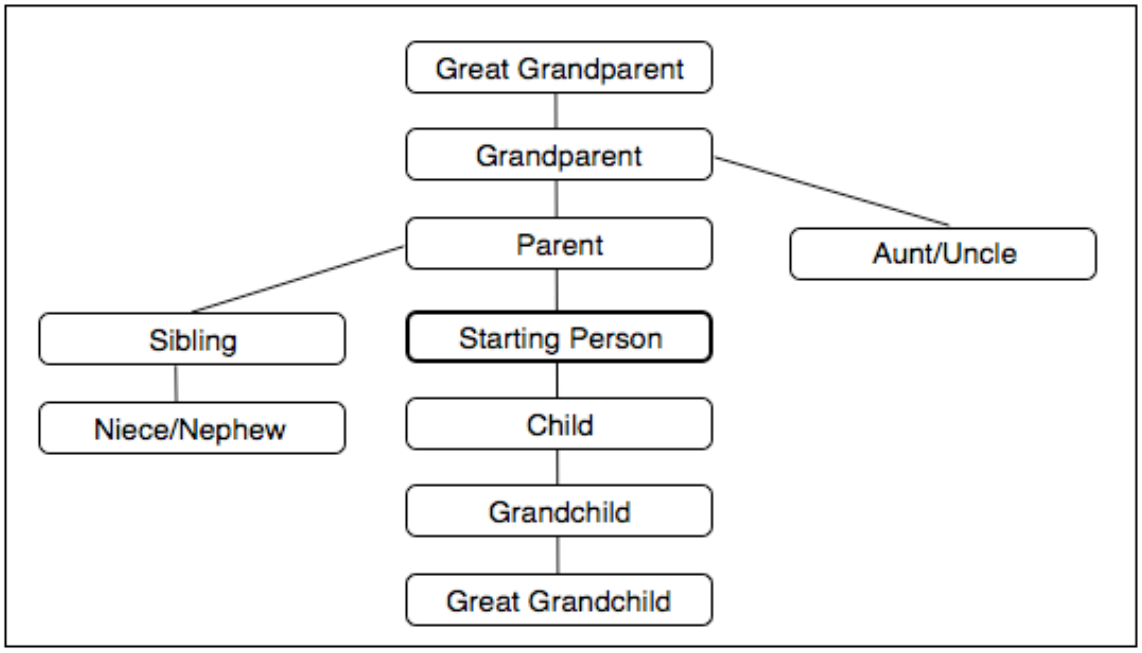
The first problem with Section 21350(b) is the reliance on the concept of "degree" of kinship. As has been noted in another study, there is no statute defining what is meant by a degree of relation. Nor is there a single well-understood rule. See First Supplement to Memorandum 2007-4, pp. 51-52 (discussing consanguinity).

There are at least three ways in which this issue could be addressed:

(1) Preserve existing language.

(2) Draft a general provision defining degrees of relation for the purposes of the Probate Code. That approach would exceed the scope of the present study, but we have general authority to study the Probate Code.

(3) Replace the reference to "relatives within the third degree" with a complete list of those relatives (e.g., the mostly likely meaning of the "third degree" of kinship is the person's parent, grandparent, great-grandparent, child, grandchild, great-grandchild, sibling, niece, nephew, uncle, and aunt. See the diagram below. Each connecting line represents a degree of kinship.)



That approach makes sense as way of mapping genealogical descent, but probably doesn't actually reflect the intimacy of a person's familial relationships.

The Commission should decide what general approach to take on this issue. The staff will draft implementing language in a later memorandum.

Domestic Partnership

The existing statute disqualifies a person "who is related by blood or marriage to, [or] is the domestic partner of," a drafter or fiduciary transcriber. See Section 21350(a)(2) & (5).

The existing language yields odd, and probably unintended, results. For example, the parent of the spouse would be disqualified (as being related by blood or marriage under Section 21350(b), but the parent of a domestic partner would not be disqualified. Similarly, the spouse of any relative within the third

degree (e.g., brother's spouse) is disqualified, but the domestic partner of a relative within the third degree (e.g., brother's domestic partner) is not disqualified.

The staff recommends that the language relating to spouses and domestic partners be overhauled to make the terms functionally interchangeable. That would be consistent with the general law governing domestic partners. See Fam. Code § 297.5(a). It also makes policy sense in this context. A spouse and domestic partner pose exactly the same risk of collusion.

This could be accomplished by revising Section 21350 to read along the general lines set out below (with ellipses used to reserve space for issues that have not yet been addressed):

> 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 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.
>
> (3) …
>
> (4) A person who is related, by blood or affinity, to any person described in paragraphs (1) to (3), inclusive.
>
> (b) For purposes of this section, "a person who is related by blood or affinity" to a person means all of the following:
>
> (1) The person's spouse, predeceased spouse, domestic partner, or predeceased domestic partner.
>
> (2) Relatives within the third degree of the person and relatives within the third degree of the person's spouse or domestic partner.
>
> (3) The spouse or domestic partner of any person described in paragraph (2).
>
> …

Cohabitants

Section 21350(a)(2) & (5) presumptively disqualify a "cohabitant" of a drafter or fiduciary transcriber. The term "cohabitant" is not defined for the purposes of Section 21350. However, it is defined in Section 21351(a), which establishes an exception for a gift to the *transferor's* cohabitant. That section incorporates a definition from the law governing domestic violence, which defines "cohabitant" as follows:

> [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.

See Penal Code § 13700(b). **The staff recommends that the same definition be applied to Section 21350.**

Business Associates

Section 21350(a)(2) & (5) presumptively disqualify an "employee" of a drafter or fiduciary transcriber.

Section 21350(a)(3) presumptively disqualifies any "partner or shareholder of any law partnership or law corporation in which [a drafter] has an ownership interest, and any employee of that law partnership or law corporation."

The latter provision raises several questions:

(1) Why should Section 21350(a)(3) be limited to a law firm. Suppose that the drafter is an accountant? Wouldn't logic suggest that a partner or employee of the drafter's accounting firm be disqualified?

(2) Section 21350(a)(3) should probably not be limited to a partnership or corporation. Suppose a law firm (or other firm) is organized as a limited liability company. Such a firm should be treated in the same way as a partnership or corporation.

(3) Why should Section 21350(a)(3) be limited to a firm in which a drafter has an interest? Wouldn't logic suggest that the firm of a fiduciary transcriber also be disqualified?

The staff recommends that the provisions for disqualification of a business associate be generalized to disqualify any business associate of a drafter or fiduciary transcriber.

Doing so might be tricky. It would be necessary to limit the scope of disqualification, to avoid the disqualification of remote associates. For example, "business associate" could be defined along the following lines:

> For the purposes of this part, a "business associate" of a person means any of the following persons:
> (1) An employee of the person.
> (2) A partnership in which the person is a partner.
> (3) A business entity in which the person has at least a 10 percent ownership interest.

(4) A partner or employee of a business described in paragraph (2) or (3).

(5) A person who has at least a 10 percent ownership interest in a business entity described in paragraph (2) or (3).

The 10 percent ownership threshold would avoid unreasonably attenuated associates who might otherwise be disqualified if the standard were based on *any* ownership interest. Ten percent is the threshold used in the Political Reform Act of 1974, to determine whether a person has a reportable economic interest in the income of a business entity. See Gov't Code § 82030(a). **The staff invites suggestions for other ways to limit the scope of disqualification.**

If that approach seems too complicated, an alternative would be to preserve the special rule for a law firm, but extend its application to a fiduciary transcriber. Once the Commission decides how to approach this issue, the staff will prepare implementing language.

Relations and Associates of Transferor-Drafter

Read literally, Section 21350(a)(2) would disqualify the relatives and employees of a transferor *who drafts his or her own instrument*. Similarly, subdivision (a)(3) would disqualify the law firm associates of a transferor-drafter.

The existing exception for gifts to close relatives would neutralize much of the problem, but there is no similar exception for business associates of the transferor. Thus, under existing law, if a transferor drafts her own will and includes a gift to a law partner, that gift is presumed to be invalid.

This might be a mostly theoretical problem. In the real world, it should be fairly easy to overcome the presumption of undue influence when a transferor drafts his or her own instrument. However, the problem could be avoided by adding language to make clear that the provision disqualifying a drafter does not include a transferor-drafter. **Should the proposed law address that issue?**

REMAINING ISSUES

The following issues remain to be addressed in future memoranda:

- Disqualification of "care custodians."
- Disqualification of interested witnesses.
- Exceptions to disqualification.
- Requirements for rebuttal of the presumption.

- Independent attorney certification of an otherwise invalid gift.
- Miscellaneous provisions.

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.
