Study L-622 March 12, 2008

Memorandum 2008-14

Donative Transfer Restrictions: Interested Witness as 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)).

That statute operates to presumptively invalidate a gift to specified types of "disqualified persons":

- A person who drafts the donative instrument.
- A person who is a fiduciary of the donor and who transcribes the donative instrument or causes it to be transcribed.
- The care custodian of a dependent adult.
- A specified family member or business associate of any of the preceding persons.

Probate Code Section 6112 has a similar effect. In specified circumstances, it creates a statutory presumption of menace, duress, fraud, and undue influence when a will makes a gift to a witness of the will. Because of the similarity between Section 6112 and the Donative Transfer Restriction Statute, the Commission should consider coordinating the two laws.

There are fairly significant differences between the two statutes. Consequently, any coordination would result in substantive changes. The purpose of this memorandum is to describe those differences so that the Commission can decide whether it makes sense to consolidate the two statutes, or leave them separate.

An exhibit to this memorandum includes the following:

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

In general, Section 6112 creates a presumption of menace, duress, fraud, or undue influence when a will makes a devise to a "subscribing witness." However, there appear to be four exceptions:

Superfluous Witness

Section 6112 does not create a presumption of menace, duress, fraud, or undue influence if the attestation of the interested witness is not necessary to validate the will. Thus, if there are at least two other "disinterested" witnesses, Section 6122 does not presume the invalidity of a devise to a surplus witness.

> Where there are two disinterested witnesses, the interested witness is superfluous, and there is no reason to apply the adverse presumption.

Revision of Wills and Intestate Succession Law, 17 Cal. L. Revision Comm'n Reports 537, 541 (1984). See also Section 6110(c) (two witnesses required for execution of will).

That policy makes sense. The purpose of a witness is to verify that a will is authentic. It also gives the witness an opportunity to evaluate the testator's capacity and freedom from coercion. That function is undermined if the witness has an interest in the will. An interested witness may not be reliable.

However, if there are enough disinterested witnesses to validate the will, then the function of the witnesses is fulfilled. The fact that the will makes a gift to a superfluous witness does not undermine the function of the disinterested witnesses.

Holographic Will

The presumption of menace, duress, fraud, or undue influence does not arise under Section 6112 if a valid "holographic will" (i.e., a will that is entirely handwritten and signed by the testator) makes a devise to a witness. *In re Reynolds' Estate*, 94 Cal. App. 2d 851, 855, 211 P.2d 608 (1949). That makes sense, because a holographic will can be valid without *any* witnesses. Section 6111(a). Thus, any witness to a holographic will is a "superfluous" witness.

The existing exception of holographic wills from Section 6112 could be stated much more clearly than it is. Under existing statutory law, the exception must be pieced together as follows:

- Section 6112 applies to a "subscribing witness."

- "Subscribing witness" means a witness under Section 6110.
- A holographic will is authorized under *Section 6111*, not Section 6110. Thus, a witness to a holographic will is not a "subscribing witness."
- Therefore, Section 6112 does not apply to a witness to a holographic will.

Statutory Form Will

Under existing law, a person may use a statutory form to execute a will. See Section 6240. There are special rules for such wills. See Sections 6200-6243.

Apparently, there is no statutory presumption of undue influence when a form will is used to make a gift to a person who witnesses the will. By its terms, Section 6112 would not apply to a witness to a form will (because such a witness acts under Section 6221 and is therefore not a "subscribing witness"). Nor is there any equivalent to Section 6112 in the statutes that govern form wills.

It may be that the Legislature intended more lenient treatment for form wills, which are more likely to be executed without the advice of counsel. Alternatively, the difference in treatment may simply reflect that the law governing the statutory form will was developed separately from the general law on wills. See Memorandum 1982-65 (noting pending legislation to authorize the statutory form will). The two bodies of law may not have been coordinated at that time.

The staff invites comment on whether the statutory presumption of undue influence should exist when a form will makes a gift to a necessary witness.

Devise Made in "Fiduciary Capacity"

Section 6112 expressly exempts a witness who is "a person to whom the devise is made solely in a fiduciary capacity." That language is somewhat opaque. It could describe (1) a testator who was acting in a fiduciary capacity in making a devise, (2) a devise made by a fiduciary (e.g., a conservator) on behalf of a transferor, or (3) a devise to a beneficiary who is acting as a fiduciary.

Apparently, the third option was the intended meaning. The "fiduciary capacity" language was not recommended by the Commission, but was added to a Commission bill that amended Section 6112. The Commission then approved a revised Comment to Section 6112, which explained the inserted language:

> New subdivision (c) of Section 6112 is amended to make clear that, where the will is witnessed by a person to whom a devise is made in a fiduciary capacity, the presumption of undue influence

> does not apply. This is consistent with *Estate of Tkachuk*, 73 Cal. App. 3d 14, 139 Cal. Rptr. 55 (1977).

Communication from the California Law Revision Commission Concerning Assembly Bill 158, 20 Cal. L. Revision Comm'n Reports 235 (1990).

In *Estate of Tkachuk*, the transferor's will left his entire estate to his church. One of the two subscribing witnesses was an officer of the church. The devise was challenged under former Section 51 (the predecessor of Section 6112, which *voided* a gift to an interested subscribing witness). The court conceded that the witness had an interest in the devise, but read the statute as applying only where a devise is made directly to a subscribing witness. Because the devise was to the church, which was a separate legal entity, it was not subject to Section 51. *Tkachuk*, 73 Cal. App. 3d at 17.

The court rejected a policy argument that a gift to an officer of a devisee-entity poses the same sort of risk of undue influence as a gift directly to the officer. It did not dispute that proposition, but insisted that it was bound by the language of the statute. *Id.* at 18-19.

The staff believes that there is reason to be suspicious of a will that makes a gift to an entity in which a subscribing witness holds a position or has an interest. The problem is similar to the problem that seems to underlie the vicarious disqualification of a disqualified person's close relatives and business associates under Section 21350. Such a gift may involve collusion between the disqualified person and the beneficiary or some sort of indirect benefit to the disqualified person.

Nonetheless, Section 6112 exempts such gifts. Notably, Section 21351(f) includes a similar exemption, exempting any gift to a nonprofit entity, without regard for whether a disqualified person has an interest in the entity. The staff believes that these sections constitute fairly significant loopholes. A person could use undue influence to procure a gift to a mutual benefit corporation in which the person is a member or officer. The benefit of that gift could accrue indirectly to the person who procured it. **That issue will be discussed further in a separate memorandum on general exceptions to the Donative Transfer Restriction Statute.**

SIGNIFICANT DIFFERENCES BETWEEN SECTION 6112 AND THE DONATIVE TRANSFER RESTRICTION STATUTE

There are a number of significant substantive differences between Section 6112 and the Donative Transfer Restriction Statute:

- *Disqualification of Relatives and Associates*: Section 6112 does not disqualify a close relative or business associate of a subscribing witness. Section 21350 does disqualify a close relative or business associate of a "disqualified person."
- *Exemption of Relatives*: Section 6112 does not exempt a subscribing witness who is a relative of the testator. Section 21351 does exempt a relative of a transferor.
- *Standard of Proof*: Section 6112 requires that the presumption of undue influence be rebutted by a preponderance of the evidence. Section 21351 requires rebuttal by clear and convincing evidence, and requires that there be evidence other than the disqualified person's testimony.
- *Effect of Invalidation*: If a devise is invalidated under Section 6112, the disqualified devisee will still take whatever that person would have received under any prior instrument that is revoked by the invalidated instrument, or if none, under the rules of intestacy. Section 21353 allows a disqualified beneficiary to receive only what that person would have received in intestacy.
- *De Minimis Gift Exception*: Section 6112 does not include such an exception. Section 21351 does.
- *Independent Attorney Certification*: Section 6112 does not provide a procedure to save an invalidated devise through independent attorney certification. Section 21351 does.

DISCUSSION

There are three main alternatives for the Commission to choose between: (1) Leave Section 6112 unchanged. (2) Leave Section 6112 in place, but make some minor clarifying changes to its language. (3) Delete Section 6112 and incorporate its substance into Section 21350.

Leave Section 6112 Unchanged

This is the most conservative option, and it has some merit. The Commission's assignment from the Legislature makes no reference to Section 6112. Strictly speaking, there is no requirement that the Commission coordinate Section 6112 with the similar provisions of the Donative Transfer Restriction Statute.

What's more, the staff is not aware of any serious substantive problems with the operation of Section 6112. There are no appellate decisions or journal articles that expose any significant shortcomings of the current provision.

Clarify Section 6112

A slightly less conservative approach would be to leave Section 6112 in place, but make a few minor clarifying amendments to address ambiguities found by the staff in analyzing the section. Specifically, it might be helpful to draft clearer language on the following issues:

- The exemption of holographic wills.
- The exemption of gifts made in a "fiduciary capacity."
- The exemption of form wills.

It would be fairly simple to make those improvements and would probably be noncontroversial. However, if the Commission decides to make any improvements to Section 6112, it might be difficult to explain why the Commission didn't go farther and fully coordinate Section 6112 with the Donative Transfer Restriction Statute.

Coordinate Section 6112 with the Donative Transfer Restriction Statute

The study of the Donative Transfer Restriction Statute involves the question of who should be a "disqualified person" under that statute. Under Section 6112, an interested witness to a will is the functional equivalent to a disqualified person under Section 21350.

The question then becomes, why should disqualified *witnesses* be treated differently from any other class of disqualified person? The staff sees no obvious policy basis for different treatment. Why, for example, is a spouse of a drafter presumptively disqualified, but the spouse of a necessary witness is not? Why is there a de minimis exception for a gift to a drafter, but not for a gift to a witness? Why is the independent attorney certification procedure available to save a gift to a drafter, but unavailable to save a gift to a witness?

These differences do not appear to reflect deliberate policy choices. It seems more likely that the bills that added and amended the Donative Transfer Restriction Statute were drafted without considering Section 6112. Improvements that were made to the former were not generalized to apply to the latter.

If Section 6112 were deleted and Section 21350 amended to include a necessary witness of a will as a species of "disqualified person," the current

features of the two statutes could be harmonized and applied uniformly to all disqualified persons. What's more, any future improvements to the Donative Transfer Restriction Statute would automatically be applied to will witnesses.

The staff recommends this approach. For the most part, it probably makes sense to apply the provisions of the Donative Transfer Restriction Statute to the presumption of undue influence that arises when a will makes a gift to a necessary witness. There might be instances where the rule provided in Section 6112 is better policy than the equivalent rule in the Donative Transfer Restriction Statute (e.g., the preponderance of evidence standard for rebutting the presumption of undue influence might be more appropriate than the clear and convincing evidence standard). If so, then the Commission can choose the better policy and apply that rule uniformly to all disqualified persons.

REMAINING ISSUES

The following issues remain to be addressed in future memoranda:

- General exceptions to disqualification.
- Requirements for rebuttal of the presumption.
- Independent attorney certification of an otherwise invalid gift.
- Miscellaneous provisions.

Respectfully submitted,

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Executive Secretary

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.

PROBATE CODE SECTION 6112

§ 6112. Witnesses

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.