Study L-622 March 19, 2008

Memorandum 2008-15

Donative Transfer Restrictions: Exceptions to Disqualification

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.

Memorandum 2008-14 discusses the possibility of including an interested witness of a will as an additional type of disqualified person.

This memorandum discusses categorical exceptions to the disqualification of a person under the Donative Transfer Restriction Statute. It does not discuss the ways in which a gift to a disqualified person can be saved (i.e., by rebuttal of the presumption of undue influence, or independent attorney certification that the gift is not the product of fraud or undue influence). Those matters will be discussed in a later memorandum.

A copy of the Donative Transfer Restriction Statute is attached as an exhibit. Except as otherwise indicated, all statutory references in this memorandum are to the Probate Code.

TYPES OF EXCEPTIONS

Section 21351 exempts all of the following classes of gifts from the statutory presumption of fraud and undue influence:

(1) A gift to the transferor's spouse, domestic partner, cohabitant, or relative within the fifth degree of blood or marriage. Section 21351(a), (g).

(2) A donative instrument that is drafted by the transferor's spouse, domestic partner, cohabitant, or relative within the fifth degree of blood or marriage. Section 21351(a), (g).

(3) A gift made by a conservator on behalf of a conservatee, that is approved by the court under the procedures for substituted judgment. Section 21351(c).

(4) A gift to a public entity or tax-exempt nonprofit entity. Section 21351(f).

(5) A gift of $3,000 or less, but only if the estate is valued at $100,000 or more. Section 21351(h).

(6) A donative instrument executed outside of California by a transferor who was not a resident of California at the time of execution.

Each of these exceptions is discussed below.

GIFT TO RELATIVE

The common law recognizes that an "unnatural gift" may be evidence of undue influence. An estate plan may be considered unnatural if it fails to provide for close family members (the "natural objects" of the transferor's bounty), or treats those natural objects unequally. 64 Cal. Jur. 3d *Wills* §§ 158, 163 (2007).

In effect, the concept of the unnatural gift is a sort of presumption that a transferor will favor close relatives over those who are more remote in relation and intimacy. Under that reasoning, a gift to a spouse, domestic partner, cohabitant, or close relative is natural and is therefore less likely to have been the product of undue influence. Consistent with that assumption, the Donative Transfer Restriction Statute exempts gifts to those persons from the presumption of undue influence. Section 21351(a).

The fact that close relatives are exempt from the operation of the Donative Transfer Restriction Statute does not preclude a person from contesting such a gift on the grounds of menace, duress, fraud, or undue influence. It simply means that the statutory presumption would not apply. The contestant would bear the burden of proving undue influence, under common law principles.

That basic policy choice seems sound. However, there are some details, having to do with the scope of the exception, that need to be addressed. They are discussed below.

Related by Blood or Marriage

Section 21351(g) provides that "'related by blood or marriage' shall include a person within the fifth degree or heirs of the transferor." The staff has a number of technical concerns about that standard.

"Shall Include"

Use of the term "include" suggests that there might be other persons, not described in Section 21351(g), who fall within the meaning of "related by blood or marriage." **That imprecision is problematic.** The class of persons who are exempt from the presumption of undue influence should be readily determinable.

Definitional Detail

Section 21350(b) provides a definition of "related by blood and marriage," but its application is limited to Section 21350 (which defines the persons who are presumptively disqualified):

> 21350. …
> (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.

That definition provides more detail than the definition provided in Section 21351(g). Specifically, it includes the spouses of blood relatives and provides specific guidance on special cases. See Sections 6406 ("halfblood" relatives), 6407 (unborn relatives of decedent), 6450-6455 (adoptees, children born out of wedlock, foster parents, step-parents).

The staff sees no policy reason to provide those details in the disqualification provision but exclude them from the exemption provisions. The difference probably reflects a drafting oversight.

The staff recommends that the definition from Section 21350(b) be generalized so that it applies to both Section 21350 and Section 21351 (with the technical improvements discussed in Memorandum 2008-10, which mostly involve harmonizing the treatment of spouses and domestic partners).

Degree of Kinship

Under the existing statute, a relative of a disqualified person is also disqualified, if the relative is within the *third* degree of kinship of the disqualified person. See Section 21350(b).

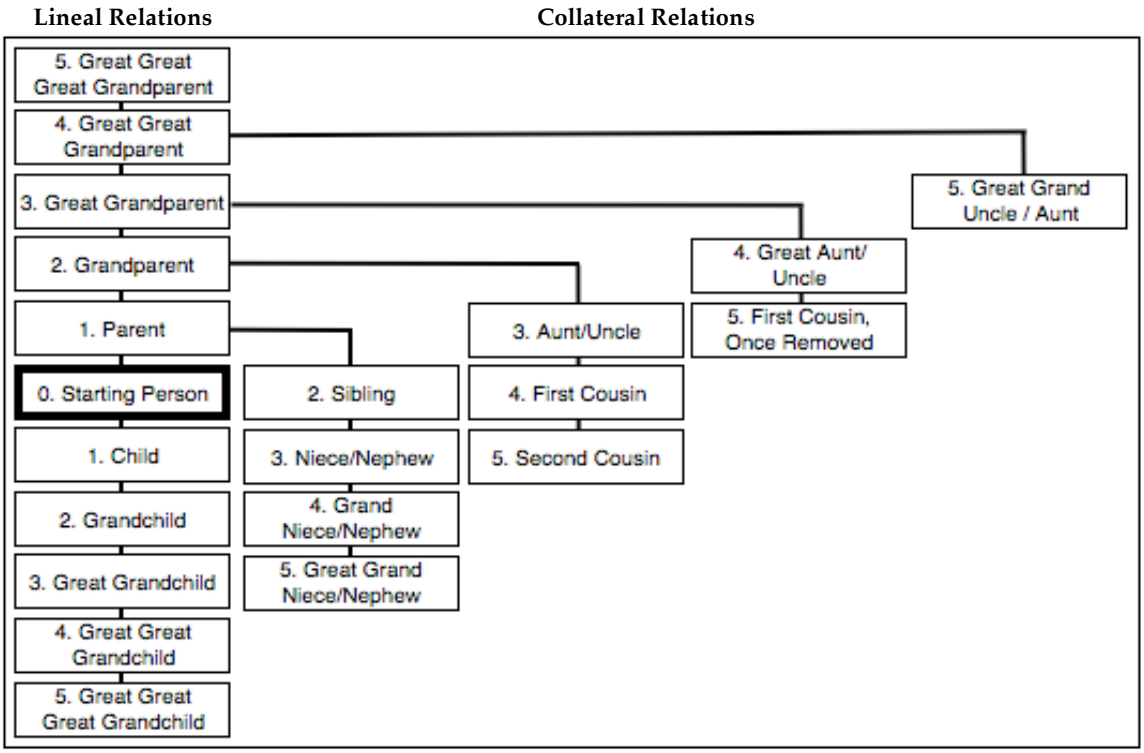
By contrast, a person is exempt from disqualification if that person is within the *fifth* degree of kinship of the transferor. The statute also exempts a donative instrument that is drafted by a person within the *fifth* degree of kinship of the transferor. See Section 21351(a), (g).

What is a degree of kinship?

Counting degrees is simple when the target relative is a direct ancestor or descendant (i.e., a "lineal" relation). Each generation constitutes a degree.

Counting is more complicated when the target relative is not in the direct line of descent or ascent (i.e., the person is a "collateral" relation). In that case, you count generations up to a common ancestor, and then down to the target relative.

The chart below shows those who fall within the fifth degree of relation to the starting person (with numbers to indicate the degree of each). Each connecting line counts as a degree:



With that information in mind, the Commission should consider whether it makes sense to use different standards to determine who is vicariously disqualified under the statute (third degree of kinship) and who is exempt from disqualification (fifth degree of kinship).

It is also worth considering whether either of those standards is too narrow or too broad. For example, does it make sense to vicariously disqualify a nephew (third degree) but not a cousin (fourth degree)? Does it make sense to exempt a great grand uncle (fifth degree)? **The staff invites public comment on these issues.**

Interpretive Guidance on Degrees of Kinship

There is no statutory guidance on how to count degrees of kinship. There used to be. Former Sections 251-253 provided:

> 251. The degree of kindred is established by the number of generations, and each generation is called a degree.
>
> 252. Lineal consanguinity, or the direct line of consanguinity, is the relationship between persons one of whom is a descendant of the other. The direct line is divided into a direct line descending, which connects a person with those who descend from him, and a direct line ascending, which connects a person with those from whom he descends. In the direct line there are as many degrees as there are generations. Thus, the child is, with regard to the parent, in the first degree; the grandchild, with regard to the grandparent, in the second; and vice versa as to the parent and grandparent with regard to their respective children and grandchildren.
>
> 253. Collateral consanguinity is the relationship between people who spring from a common ancestor, but are not in a direct line. The degree is established by counting the generation from one relative up to the common ancestor and from the common ancestor to the other relative. In such computation the first relative is excluded, the other included, and the ancestor counted but once. Thus, brothers are related in the second degree, uncle and nephew in the third degree, cousins german in the fourth, and so on.

See 1931 Cal. Stat. ch. 281.

Those provisions were repealed on the recommendation of the Law Revision Commission, which explained the decision as follows: "The term 'degree of kinship' is not statutorily defined, since its meaning is well understood." 16 Cal. L. Rev. Comm. Reports 2509 (1982). That recommendation was made as part of a larger recommendation to modernize the provisions on wills and intestate succession, drawing heavily from the Uniform Probate Code. The only

discussion of that change in staff memoranda was a brief entry suggesting: "These sections appear to add nothing useful to the UPC succession provisions." First Supplement to Memorandum 1982-08.

It appears that the utility of the sections was evaluated in the context of the will and intestacy law of that time. However, the concept of "degree of kinship" continues to have legal relevance in other contexts, including the Donative Transfer Restriction Statute (which did not exist in 1982).

For example, the following provisions make a specific reference to "consanguinity." Civ. Code §§ 1102.2 (property transfer disclosure duty), 1103.1 (hazard disclosure on transfer of residential property), 1708.7 (tort of stalking); Code Civ. Proc. §§ 229 (juror bias), 566 (eligibility to serve as receiver), 641 (objection to referee), 1800 (assignment for benefit of creditors); Corp. Code §§ 308 (provisional director), 5225 (provisional director), 7225 (provisional director); Fam. Code §§ 6211 ("domestic violence" defined), 8705 (notice of adoption); Food & Agric. Code § 62708.5 (marketing laws); Gov't Code §§ 8893.3 (adequate wall anchorage), 8897.1 (delivery of earthquake guide to transferee of real property), 13113.8 (smoke detector requirements); Penal Code §§ 152.3 (reporting child abuse), 285 (crime of incest), 422 (criminal threats), 646.9 (crime of stalking), 836 (arrest without warrant), 3605 (witness to execution), 12028.5 (domestic violence); Prob. Code §§ 2111.5 (conservatorship), 2359 (conservatorship), 2403 (conservatorship); Veh. Code § 13803 (unsafe vehicle operation by family member).

There are also several code sections that use the term "degree of kinship." See Fam. Code § 9321 (adoption); Health & Safety Code §§ 7100 (disposition of human remains), 7105 (disposition of human remains), 24178 (human experimentation); Prob. Code §§ 673 (power of appointment), 6402 (intestate succession), 6402.5 (intestate succession); Welf. & Inst. Code §§ 319 (dependent children), 361.3 (dependent children), 361.5 (dependent children), 366.21 (dependent children), 366.22 (dependent children), 727.4 (dependent children), 11362 (medical assistance to children), 11400 (medical assistance to children).

There is no clear statutory guidance as to how those sections are to be construed. The staff is not confident that the method of calculating degrees of kinship is well understood.

If the Commission agrees, there are at least three ways that the problem could be addressed:

(1) Delete the references to "degrees of kinship" from the Donative Transfer Restriction Statute, and replace them with an exhaustive list of relationships that fall within the specified degree (e.g., rather than referencing the third degree of kinship, the statute could list the following relatives: parent, grandparent, great-grandparent, child, grandchild, great-grandchild, sibling, niece, nephew, uncle, and aunt). A list reflecting the fifth degree would need to also include a great-great-grandparent, great-great-great-grandparent, great-great-grandchild, great-great-great-grandchild, grand-niece/nephew, great-grand-niece/nephew, first cousin, second cousin, great-aunt/uncle, great-great-aunt/uncle, and first cousin, once removed).

That is an unwieldy approach that would do nothing to provide guidance in the other statutory contexts in which the concept is used.

(2) Add provisions similar to former Sections 251-253, as preliminary provisions to the Probate Code. They would then have general application for all provisions of the Probate Code. It is likely that courts would also look to those general provisions in construing similar terms in other codes.

(3) Add provisions along the lines of former Sections 251-253, as preliminary provisions in all codes that use degree of kinship terminology (i.e., the Civil Code, Code of Civil Procedure, Corporations Code, Family Code, Food & Agricultural Code, Government Code, Health and Safety Code, Penal Code, Probate Code, Vehicle Code, and the Welfare and Institutions Code). This would probably exceed our existing authority and would require more extensive review and analysis to make sure that any new guidance provisions would not cause problems when applied in other contexts.

Of those options, the staff prefers the second. It is squarely within our authority to study the Probate Code, would be fairly straightforward (because it would involve restoring former law), and would probably have some spillover benefits for courts construing other codes (without tying the courts' hands if the Probate Code rules turn out to be inappropriate in another context). **The staff recommends that the tentative recommendation include general provisions for the Probate Code, along the lines of former Sections 251-253.**

Heirs

Section 21351(a), read in conjunction with Section 21351(g), also exempts the "heirs" of a transferor. "Heir" is a defined term:

> "Heir" means any person, including the surviving spouse, who is entitled to take property of the decedent by intestate succession under this code.

Section 44. Thus, the application of Section 21351(a) requires an analysis of intestacy rights to determine who is an "heir."

Intestacy rights are fairly complicated. The surviving spouse (if any) has a guaranteed intestate share. See Section 6401. If the decedent leaves both a surviving spouse and surviving issue, surviving parents (or their issue), or surviving siblings (or their issue), there is also a specified share to be distributed to those other relations. *Id.* If there is no surviving spouse, the universe of potential heirs expands to include surviving grandparents (or their issue), the issue of the predeceased spouse, the surviving parents of the predeceased spouse (or their issue), and ultimately, the decedent's "next of kin." See Section 6402.

Setting aside for a moment the concept of "next of kin," the meaning of "heir" is largely encompassed by the fifth degree of kinship. As a practical matter, the only difference is that "heir" includes some remote issue of siblings, aunts, and uncles, that would go beyond the fifth degree of kinship (e.g., a sibling's great-great-grandchild, an aunt's or uncle's great-grandchild, etc.).

Such a broad exception is probably not justified as a matter of policy. Such remote relations are not clearly the "natural objects" of the transferor's bounty. Furthermore, the exemption of "heirs" probably isn't worth the added complexity and effort involved in determining the membership of that group. In most cases, a proper result could be achieved by referencing a particular degree of kinship and dropping the reference to "heirs."

Who are the next of kin? There is no fixed statutory definition, but there is a rule of construction that touches on the issue:

> 21114. (a) If a statute or an instrument provides for transfer of a present or future interest to, or creates a present or future interest in, a designated person's "heirs," "heirs at law," "next of kin," "relatives," or "family," or words of similar import, the transfer is to the persons, including the state under Section 6800, and in the shares that would succeed to the designated person's intestate estate under the intestate succession law of the transferor's domicile, if the designated person died when the transfer is to take effect in enjoyment. …

In other words, "next of kin" means a person's heirs. That construction is not helpful.

The staff recommends that the reference to "heirs" of the transferor be removed from Section 21351(g). It has little practical effect and adds unnecessary complexity.

Cohabitant

Section 21351(a) also exempts a gift to the transferor's "cohabitant." The term "cohabitant" is defined by incorporating a definition from Penal Code Section 13700, which governs domestic violence:

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

The staff sees no obvious problems with that definition or with the concept of exempting a "cohabitant." It seems natural that a transferor would make a gift to such a person. A gift to a cohabitant should not give rise to a presumption of undue influence.

DONATIVE INSTRUMENT DRAFTED BY RELATIVE

In addition to a gift to a relative, Section 21351(a) exempts a donative instrument drafted by a relative:

> 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 person who drafted the instrument. …

Recall that a gift to such a person is also exempt. Thus, the exception set out above has a very narrow scope. Its practical effect is to exempt a donee who is (1) not a relative of the transferor within the fifth degree (such persons are already exempt), and (2) is the business associate or relative within the third degree of the drafter.

For example: Suppose the transferor's cousin (a fourth degree relative) drafts a donative instrument for the transferor to sign. The instrument makes a large gift to the cousin's law partner. Under Section 21350, that gift would be subject to

the statutory presumption of undue influence. However, Section 21351 exempts the gift from that presumption.

The staff has speculated that the exemption of family members is based on the common law principle of the "natural" gift. Because a gift to a family member appears natural, it is not presumed to have been the product of undue influence. The same justification cannot be made for the exception described here. A gift to the business associate of a relative does not appear natural.

Another possible explanation for the exception is an assumption that a relative is less likely to abuse the transferor's trust than a stranger. That will often be true. However, there are many cases that involve elder financial abuse by relatives.

The staff is unsure whether the exception for a donative instrument drafted by a family member is good policy. We invite public comment on that issue.

On a related point, if the exception is retained, it is not clear why it should be limited to a drafter. Wouldn't the same policy considerations be involved with respect to any type of disqualified person. For example, why should the first of the following cases be exempt, while the remaining two are not:

(1) A cousin *drafts* a donative instrument making a gift to the cousin's business partner. This gift is exempt.
(2) A cousin *transcribes* a donative instrument making a gift to the cousin's business partner. This gift is not exempt.
(3) A cousin is the transferor's *care custodian*, and the transferor's estate plan makes a gift to the cousin's business partner. This gift is not exempt.

The staff invites public input on this issue.

GIFT BY CONSERVATOR

Section 21351(c) exempts a gift made by a conservator, on behalf of a conservatee, if the gift is approved by the court under the procedure for reviewing and approving such actions by a conservator.

This exception makes sense. If a court has already reviewed and approved the gift, there is no reason to presume it is the product of undue influence. **The staff recommends no change to this provision.**

GIFT TO NONPROFIT ENTITY

Section 21351(f) exempts a gift to any of the following entities:

> 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.

Section 6112 provides a similar exception for an interested witness of a will. A gift made under the will is not presumed to be the product of undue influence if the witness is acting as the fiduciary (e.g., a trustee or officer) of a legal entity that receives a gift under the will.

The staff is unsure of the rationale for these exceptions. A gift to a legal entity is not "natural" in the same way as a gift to a family member. Nor is there any reason to believe that the representative of a legal entity is less likely to exert undue influence than any other person.

There are a number of ways in which this exception might be abused:

- A swindler procures gifts on behalf of a "charitable" nonprofit that pays the swindler a large salary.
- A swindler procures gifts to a nonprofit mutual benefit corporation in which the swindler is a member. The corporation is later dissolved and, pursuant to its governing documents, distributes its assets to its members.
- A legitimate officer of a church or charity exerts inappropriate pressure on vulnerable seniors to change their estate plans to name the entity as the sole beneficiary.

Nonetheless, it may be that society's general interest in promoting gifts to nonprofits is enough to justify the exception. **The staff invites public comment on this issue.**

SMALL GIFT

Section 21351(h) provides an exception for a gift of $3,000 or less, provided that the value of the total estate is at least $100,000.

The policy underlying the small gift exception is sound. A small gift is more likely to be "natural" when viewed in proportion to the other gifts made in an

estate of that size. It is therefore less likely to have been the product of undue influence.

The Trusts and Estates Section of the State Bar ("TEXCOM") has written in support of the small gift exception, though it offers no suggestion as to the proper amount. See Memorandum 2008-13, Exhibit p. 2.

The staff recommends that the small gift exception be retained, but redrafted to improve its clarity (it currently employs a confusing double-negative construction).

The Commission should also consider whether the $3,000 and $100,000 amounts should be adjusted. The $3,000 amount was first set when the Donative Transfer Restriction Statute was enacted, in 1993. If that figure is adjusted for inflation (using the Bureau of Labor Statistics online inflation calculator: www.data.bls.gov/cgi-bin/cpicalc.pl), the adjusted amount would be $4,395. **The Commission should consider increasing the small gift amount, perhaps to $5,000.**

The $100,000 requirement for the minimum total value of the estate is incorporated by reference, from Section 13100. That section defines a "small estate" for the purposes of nonprobate administration of small estates. The Legislature will undoubtedly adjust that amount from time to time, **so there is probably no need for the Commission to change the amount.**

INSTRUMENT DRAFTED OUTSIDE CALIFORNIA BY NONRESIDENT

Section 21351(i) exempts a donative instrument that was drafted outside of California by a person who was not a resident of California when the instrument was executed. That makes sense. Such a person is not on notice of the special limitations that the Donative Transfer Restriction Statute places on certain gifts, or of the special procedure that can be used to validate an otherwise disqualified gift (i.e., independent attorney certification).

For that reason, it would probably be unfair to apply the statutory presumption of undue influence to such an instrument. **The staff recommends that this exception be continued without change.**

REMAINING ISSUES

The following issues remain to be addressed in future memoranda:

- Requirements for rebuttal of the presumption.

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

Respectfully submitted,

Brian Hebert
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.
