Study L-622 May 30, 2008

First Supplement to Memorandum 2008-21

Donative Transfer Restrictions (Public Comment)

The Commission has received two letters in response to Memorandum 2008-21, which presented a staff draft tentative recommendation on reforming the donative transfer restriction statute. The letters are attached in the Exhibit, as follows:

The issues raised in those letters are discussed briefly below. Except as otherwise indicated, all statutory references in this memorandum are to the Probate Code.

CARE CUSTODIAN ISSUES

Burden of Establishing that Transferor was "Dependent Adult"

James R. Birnberg suggests that the proposed law should be clearer that the person contesting a donative transfer to a care custodian bears the burden of establishing that the transferor was a dependent adult. See Exhibit p. 1.

The staff agrees that the contestant should bear that burden. However, the same is true with respect to every fact that must be proven under the proposed law in order to trigger the statutory presumption. For example, if a gift is being challenged on the ground that the drafter of the donative instrument is also a beneficiary of the instrument, the contestant would need to prove that the beneficiary drafted the instrument.

The staff believes that general evidence law would already operate to impose the initial burden of proof on the contestant.

> Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.

Evid. Code § 500.

Does the Commission wish to add language expressly stating that the burden of proving the facts necessary to trigger the statutory presumption falls on the contestant?

Timing of "Dependent Adult" Status

Mr. Birnberg suggests that the proposed law should be clearer in stating that the transferor must have been a dependent adult *at the time of the transfer*, in order for the statutory presumption to apply. See Exhibit p. 2.

The introductory clause of proposed Section 21366 already states that timing rule:

> 21366. "Dependent adult" means a person who, *at the time of executing the donative instrument at issue under this part*, satisfied both of the following requirements:
>
> (a) The person was 18 years old or older.
>
> (b) A court would have appointed a conservator for the person, under subdivision (a) or (b) of Section 1801, if a petition for conservatorship had been filed.

(Emphasis added.) However, this point could perhaps be reinforced by revising the Comment to proposed Section 21366 as follows:

> **Comment.** Section 21366 is new. <u>To be a "dependent adult" under this section, a person must satisfy the requirements of subdivisions (a) and (b), at the time of executing the donative instrument at issue under this part.</u>

The staff sees no harm in adding that clarification and recommends that the revision be made.

Meaning of "Compensation"

Mr. Birnberg also questions whether the requirement that a "care custodian" be a person who provides services for "compensation" is clear enough. See Exhibit p. 2. Might the gift itself be considered "compensation" for services in some instances?

The staff invites input on whether a different term should be used in this context. Perhaps the term "salary" or "wages" could be used.

Types of Services Provided by Care Custodian

Proposed Section 21362(b) would define the services provided by a "care custodian" as follows:

> (b) For the purposes of this section, "health and social services" include, but are not limited to, the administration of medicine, medical testing, wound care, housekeeping, shopping, cooking, transportation, assistance with hygiene, and assistance with finances.

Neil F. Horton believes that this list is too broad. It would encompass a housekeeper, cook, or driver. He does not believe that domestic servants of those types present the risk of undue influence that the proposed law is intended to address. Many wealthy people leave significant gifts to their domestic servants, without any undue influence being involved. See Exhibit p. 3.

That is a good point. However, the statutory presumption of undue influence only arises if a *dependent adult* makes a gift to a care custodian. The staff is not sure that the risk of undue influence is beyond the scope of the proposed law when a housekeeper, cook, or driver receives a large gift from someone who would qualify for a conservatorship if a petition for conservatorship were filed.

The staff recommends that a note following Section 21362 specifically ask for comment on this issue.

CERTIFICATION OF INSTRUMENT BY DRAFTING ATTORNEY

Under proposed Section 21384(c), an attorney who drafts a donative instrument making a gift to a care custodian can certify that the instrument is not the product of fraud or undue influence, so long as the attorney is an "independent attorney" (i.e., is independent of the interests of the beneficiary, pursuant to the standard provided in proposed Section 21370).

Mr. Birnberg is concerned that an attorney-drafter, who certifies an instrument drafted by that attorney, might be mistaken in believing himself or herself to be "independent." If so, the gift might fail and the attorney could then face malpractice liability. See Exhibit p. 2.

The staff does not believe that this problem is limited to the attorney-drafter situation. Any attorney who acts to certify a donative instrument under the proposed law must be an "independent attorney." Thus, any certifying attorney could be mistaken about being independent, leading to invalidation of the instrument and potential malpractice liability.

That risk seems inherent in the choice to certify the instrument, and it is not clear how it could be avoided.

SMALL GIFT EXCEPTION

Mr. Birnberg suggests that the small gift exemption amount is too small. He proposes that it be increased and that the cap be measured either as a fixed amount (e.g., $5,000) or as a percentage of the total value of the estate (e.g., 5% of the total value of the estate), whichever is larger. See Exhibit p. 2.

That is a reasonable suggestion. If the point of the small gift exception is to exempt gifts that are so small as to seem "natural" with respect to other gifts given by the same transferor, a rule based on a percentage makes sense. For example, in a million dollar estate, a gift of $50,000 to a personal assistant might well appear "natural" as compared to other, larger gifts.

Should that approach be taken in the proposed law?

STATUTE OF LIMITATIONS

Proposed Section 21392 would continue the existing statute of limitation rules for an action brought under the Donative Transfer Restriction Statute:

> 21392. An action to establish the invalidity of a gift under this part can only be commenced within the following periods:
>
> (a) In the case of a devise made in a will, at any time after letters are first issued to a general representative and before an order for final distribution is made.
>
> (b) In the case of a transfer made in any other donative instrument, 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.

Mr. Horton raises a number of concerns about those special timing rules, which are considerably more flexible than the general law governing commencement of a will or trust contest. See Exhibit pp. 4-6.

Specifically, he believes that the public policy interest in the speedy and certain administration of estates weighs against providing longer (and potentially open-ended) periods for commencing a contest under the proposed law.

If the special rules are continued, he suggests that language be added to better coordinate with Section 16061.7 (governing trust contests) and to clarify what is meant by "three years from the date the person bringing the action discovers, or reasonably should have discovered, the facts material to the transfer."

As noted in Memorandum 2008-21, the staff is not sure why the special timing rules exist. Mr. Horton makes a good argument against continuing them. **The Commission should consider deleting proposed Section 21392 and adding text to the preliminary part noting that deviation from existing law and specifically requesting public comment on its merits.**

Respectfully submitted,

Brian Hebert
Executive Secretary

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May 16, 2008

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Re: Revision of Donative Transfer Restrictions: Care Custodians
Study L-622 (Staff Tentative Recommendation)
Memorandum 2008-21

Dear Brian:

I am following up on your suggestion in Memorandum 2008-21 that I provide a response to the Staff Draft Tentative Recommendation. My comments below address the care custodian, the self-certification, and the "small gift" provisions, as now proposed.

As I mentioned in our telephone conversation yesterday, I think the approach now being proposed for the care custodian issue is an improvement over the prior version under which virtually anyone could be found to be a care custodian. However, on looking at the June 2008 draft of May 14, 2008 ("Draft Recommendation"), I believe the change in approach raises new and different concerns.

First, the Draft Recommendation, in narrowing the definition of a dependent adult, in proposed section 21366(b) to have it apply to a person for whom "a court would have appointed a conservator of the person...," leads me to inquire who would have the burden of establishing that fact. Since this condition is a prerequisite to the application of the statute, it is not the same thing as the presumption of lack of undue influence that the transferee is asked to overcome in proposed section 21380(b).

Therefore, I think that the person seeking disqualification should have the burden of establishing that the transferor is a dependent adult first before the transferee is asked to overcome the presumption in proposed section 21380(b). Also, I think it should be made clear that the determination under section 21366(b) is for the period when the donative transfer is made.

Second, proposed section 21362(a) in the Draft Recommendation speaks of the care custodian providing services "for compensation, as a profession or occupation...." What constitutes "compensation?" Is it perhaps the gift itself? Is it some form of payment other than money that has economic value (such as rent-free occupancy)? Is even one paid employment sufficient to make it a "profession or occupation?" Should the language require the person to hold him- or herself out to be a professional care custodian?

Although many lawyers would want to be able to self-certify for gifts to care custodians, which the Draft Recommendation now includes, I am not sure that this approach provides adequate protection for the self-certifying attorney. What if the lawyer, believing he or she is "independent," is later determined in litigation not to be so, for reasons that he or she did not think of, that fact would result in the purported certification being thrown out, the attorney being threatened with malpractice for not having advised the client to seek a second lawyer, and having his or her testimony impeached on the grounds that it is self-serving to protect his or her work product and his or her failure to be independent contrary to what he or she actually was.

Finally, I think the exemption for "small gifts" in proposed section 21382(e) of the Draft Recommendation is too small and is inflexible. It only applies to gifts not in excess of $5,000 if the total estate currently is under $100,000 (while the section 13101 amount may be increased by the Legislature, the $5,000 amount is not). Would it not be preferable to have the amount of the exemption be dependent upon the lesser of a dollar amount and a percentage of the total estate? My thought would be to make the exemption the lesser of $25,000 or 5% of the value of the estate, but not less than $5,000. This would be essentially the same as proposed section 21382(e) for a $100,000 estate but would allow for comparatively insubstantial gifts in larger estates. A collateral benefit would be the avoidance of certifications on these gifts.

Very truly yours,

James R. Birnberg

JRB:Deb
cc: Peter Stern, Esq., Chair, Trusts and Estates Executive Committee

EMAIL FROM NEIL F. HORTON
(MAY 25, 2008)

Dear Brian,

Neither Texcom's Executive Committee nor its CLRC committee has had an opportunity to discuss Memorandum 2008-21. Except as stated below, these comments reflect my own views.

Services provided by care custodian

The Tentative Recommendation's open-ended list illustrating the kinds of "social services" that define a donee as a "care custodian" does not accurately address the concerns that underlie the statute. As the Tentative Recommendation points out, pp. 7-8, those concerns are that, "The intimacy, privacy, and duration of a care custodian relationship provides a significant opportunity to exert undue influence." The list unduly restricts an elder's testamentary freedom by including gifts to many kinds of people whose job does not put them in a position to exert undue influence.

It is not unusual for a wealthy client to leave a gift of more than $5,000 in her estate plan for a person who cleaned her home or a cook who visited to prepare meals. In a case with which I am familiar, when the decedent no longer could drive, she re-titled her car in her neighbors' names and they then drove her in her car to medical appointments and to the social club to which they all belonged. Cousins living on the East Coast who had not seen the decedent in decades claim that the neighbors were care custodians and barred from taking under her trust. Under the proposed law, the cousins would claim that the car was not a gift, but was compensation under an implied agreement to drive the decedent.

Providing the kinds of services I have described does not put one in a position to exert undue influence. The law regarding undue influence is adequate to determine whether a testamentary gift to a housekeeper, cook, or driver is valid. The court can determine whether the donee was in a confidential relationship with the elder, whether the donee's involvement in the gift was sufficient to constitute "active participation" or "procurement," and whether the benefit was "undue."

One the other hand, companions and practical nurses often spend a lot of time alone with a client. They are in a position to exert undue influence. Those on whom a dependent adult must rely for bathing, dressing, transferring to or from a bed or chair, assistance with incontinence or toilet, or being fed are in a position to exert undue influence because of the intimacy and privacy inherent in their services, . If the statute contains an illustrative list, it would better achieve its purpose if it deleted "social services" but broadened the list of "health services" to include not only "assistance with hygiene," but also those companions and practical nurses who provide these kinds of services.

CLRC should clarify the limitations period where a trustee serves notice under section 16061.7.

Texcom believes that the proposed statute should clarify the applicable period of limitations where a settlor's death triggers the trustee's duty to notify beneficiaries and heirs that the time within which they must contest the trust is 120 days after service of the notification or 60 days after a copy of the trust's terms is mailed or personally delivered to them. Section 16061.7.

If the trustee serves the notice, no beneficiary objects within the time period, the trustee distributes property, and later a petition is filed alleging that the trustee has distributed property to a presumptively disqualified beneficiary, which statute applies? The more specific provisions of section 21392 may apply, but Texcom believes that the proposed statute should clarify the matter. At the very least, section 16061.8 should contain a reference to section 21392.

The limitation periods of sections 8270 and 16061.8 are preferable to the extended periods under section 21392.

One of the goals of post-death administration of a decedent's assets is to distribute the decedent's assets to the intended beneficiaries efficiently and promptly, without jeopardizing the rights of interested persons. See *Estate of Beach* (1975) 15 Cal. 3rd 623, 641. The statutory presumption of proposed section 21380 supplements the common law on fraud and undue influence. Staff Draft, Donative Transfer Restrictions, p. 1. But the limitations period under proposed section 21392(a), like the current statute, allows more time for a party to challenge a gift to presumptively disqualified beneficiary than current law allows for contests based on fraud or undue influence. Staff knows of no policy reason for this difference. Memorandum 2008-21, p. 5. The consequence will be to delay distribution of decedent's estates.

A will contest generally must be filed no later than 120 days after the order admitting it to probate. Section 8270. But proposed section 21392(a) extends the period to any time after letters are first issued to the personal representative and before the court orders final distribution. That is the same limitations period that applies to petitions to determine the persons entitled to distribution of a decedent's estate under section 11700. Petitions under section 11700 usually seek to identify an intestate decedent's heirs or to construe a will's ambiguous provisions. A party alleging invalidity because of undue influence is not allowed to bring a contest under section 11700. A final order admitting the will to probate is final and conclusive, except for extrinsic fraud or an erroneous determination of the decedent's death. Sections 8226 and 8007; see *Estate of Caruch* (1956) 139 Cal. App. 178. Thus, the period for contesting a transfer under a will on grounds that it is presumptively invalid is far more generous than it is for contesting the transfer on undue influence grounds.

For persons who leave property at death under a revocable trust, if a trustee serves the notice prescribed in section 16061.7, a contestant has 120 days after the trustee serves the notice or 60 days after the trustee mailed or personally delivered a copy of the trust to a beneficiary in which to file a contest, including one based on undue influence. Proposed section 21392(b), like current law, for reasons unknown, greatly expands the limitations period to three years after the trust became irrevocable or three years after the contestant

discovers, or reasonably should have discovered, the facts material to the transfer. This kind of open-ended period may make sense for determining when a plaintiff should bring a tort action, but it undermines the policy of encouraging prompt distribution of decedent's estates.

Failing to correct this error will delay distribution of trust assets and increase the cost of trust administration for many beneficiaries. Careful trustees who are uncertain whether one or more beneficiaries are presumptively disqualified will not distribute trust assets without first filing a petition for instructions, incurring the expense of a court proceeding that the settlor sought to avoid by using a revocable trust. Many trustees will be wary of seeking consents from trust beneficiaries for distributions because of the possibility that one or more beneficiaries later will contend that the trustee failed to provide sufficient information, so that the consents were not informed. In addition, the trustee may violate the trustee's duty of impartiality by advising the other beneficiaries of a potential objection to another beneficiary's gift. Other trustees who distribute assets and later learn that a beneficiary may be a presumptively disqualified person will face the quandary of either expending trust funds to recover the asset pending a final determination or leaving the trust asset in the presumptively disqualified person's possession pending final determination. A trustee has the duty to take reasonable steps to take and keep control of and preserve trust assets. Section 16006. Thus, even though the trustee may not be liable for the initial transfer under proposed section 21388(b), the trustee may be liable for failing to take reasonable steps to reclaim the asset pending court determination.

"Actual notice" should refer to notice of a claim, not notice of facts giving rise to a claim.

A trustee who has "actual notice" that the donative instrument is subject to the presumption of undue influence is liable for transferring the property to the presumptively disqualified beneficiary. Proposed section 21388. Suppose that a trustee learns that a neighbor beneficiary who "looked after" the decedent in her final years received money from the decedent when she last amended and restated her trust. No beneficiary has claimed that the gift to the neighbor is presumptively invalid. Does "actual notice" refer to knowledge of facts that may give rise to a claim of presumptive invalidity or does "actual notice" refer to knowledge that a claim has been filed?

"Actual notice" should refer to notice that a claim has been filed. If the phrase, instead, refers to knowledge of facts that may give rise to a claim of presumptive invalidity, a trustee with such knowledge, where no beneficiary has contested the gift, will need to petition the court for instructions. If the gift to the neighbor is small, however, the expense of an attorney filing a petition for instructions may not be warranted. For the reasons stated above, the trustee may decide not to seek consents from the beneficiaries. Moreover, the trustee's information may be incomplete or inconclusive. For example, the decedent may have first included the gift to the neighbor in her original trust before the neighbor "looked after" her. Or the trustee may not be aware of a certificate of independent review with regard to the neighbor's gift. The danger is that a trustee with knowledge of facts that may give rise to a claim, when no claim is filed, will decide to wait until a beneficiary contests the neighbor's gift. The trustee will be protected for failing to distribute trust property under proposed section 21388. But the

period during which a beneficiary may bring a claim is open-ended. It does not run until three years from the date the beneficiary "discovers, or reasonably should have discovered, the facts material to the transfer." Proposed section 21392(b). If "actual notice" refers to facts giving rise to a claim of presumptive invalidity, the result often will be undue delay in distributing the trust assets to the decedent's intended beneficiaries.

Thank you for your excellent work on this statute and for considering these comments.

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