

## Second Supplement to Memorandum 2008-21

### **Donative Transfer Restrictions (Public Comment)**

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The First Supplement to Memorandum 2008-21 presented a letter from Neil Horton. One issue raised in that letter was not discussed. It is addressed in this supplement. All statutory references in this memorandum are to the Probate Code.

#### **Liability of Third Party Transferor**

Existing Section 21352 provides that a person is not liable for transferring property pursuant to a donative instrument, unless that person “receives actual notice of the possible invalidity” of the transfer under Section 21350, before making the transfer.

The section also provides that a person who does receive such notice is not liable for a failure to transfer property pursuant to the donative instrument, unless the validity of the transfer has been conclusively determined by the court.

Proposed Section 21388 would restate those rules, in an attempt to make the provision more understandable:

#### **§ 21388. Liability of third party transferor**

21388. (a) No person shall be liable for transferring property pursuant to a donative instrument that is subject to the presumption created under this part, unless the person received actual notice, prior to transferring the property, that the donative instrument is subject to the presumption created under this part.

(b) A person who receives actual notice that a donative instrument is subject to the presumption created under this part shall not be held liable for failing to transfer property pursuant to the donative instrument, unless the validity of the transfer has been conclusively determined by a court.

Mr. Horton points out a problem with existing Section 21352, which would be continued in proposed Section 21388. What does it mean to receive “notice” of the “possible invalidity” of an instrument (Section 21352) or that an instrument

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Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

“is subject to the presumption” (Section 21388). Would that include a person who has knowledge of facts that might give rise to the presumption, even if no contest has actually been filed?

In the staff’s experience, provisions of this type are meant to insulate third party property holders (e.g., trustees, banks, insurance companies) from liability for following instructions in a donative instrument, unless given actual notice that the validity of the donative instrument has been challenged. For example, Section 5405(a)-(b) protects a financial institution that transfers funds pursuant to the terms of an account, barring service of a court order restraining payment:

(a) Payment made pursuant to Section 5401, 5402, 5403, or 5404 discharges the financial institution from all claims for amounts so paid whether or not the payment is consistent with the beneficial ownership of the account as between parties, P.O.D. payees, or beneficiaries, or their successors.

(b) The protection provided by subdivision (a) does not extend to payments made after the financial institution has been served with a court order restraining payment. No other notice or any other information shown to have been available to a financial institution shall affect its right to the protection provided by subdivision (a).

That provision states a bright line rule on which the property holder can rely. That degree of certainty is important for large institutional property holders, like banks and insurance companies.

**The staff believes that Section 21388 is too imprecise, and recommends that it be revised as follows:**

**§ 21388. Liability of third party transferor**

21388. (a) No person shall be liable for transferring property pursuant to a donative instrument that is subject to the presumption created under this part, unless the person ~~received actual~~ is served with notice, prior to transferring the property, that the donative instrument ~~is subject to the presumption created~~ has been contested under this part.

(b) A person who ~~receives actual~~ is served with notice that a donative instrument ~~is subject to the presumption created~~ has been contested under this part shall not be held liable for failing to transfer property pursuant to the donative instrument, unless the person is served with notice that the validity of the transfer has been conclusively determined by a court.

That tightened language would relieve a third party from any duty to evaluate the legal significance of facts relating to the validity of the donative

instrument under the proposed law. Instead, the third party's duty would be to comply with the donative instrument, unless served with notice that the instrument has been contested.

Respectfully submitted,

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Executive Secretary