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First Supplement to Memorandum 2009-16

2009 Legislative Program: Donative Transfer Restrictions

Senate Bill 105 has been introduced by Senator Tom Harman to effectuate the Commission's recommendation on *Donative Transfer Restrictions*, 38 Cal. L. Revision Comm'n Reports 107 (2008).

The staff has received informal input on the proposed law from a group of probate judges. The input does not represent any formal position on SB 105, by any person or group, but it was shared with Senator Harman and the staff of the Senate Committee on Judiciary. For that reason, the staff believes it would be helpful to discuss the informal input and decide whether any action in response is warranted (e.g., revision of a Commission Comment, a recommendation that the bill be amended, or an informal written explanation to the author and committee staff).

RISK OF INCREASED LITIGATION

The judges have expressed concern that the proposed changes in the law could result in some increase in litigation:

> The statutes under consideration may be characterized as extraordinary impediments to an individual seeking to take as a beneficiary. These impediments are automatically raised in specified circumstances making it more difficult for the individual seeking to take to establish his claim. To the extent the application of these impediments are reduced, more claims by those individuals will be pursued. Those increased claims, coming from suspect circumstances, are very likely to be challenged by those who would otherwise take. It is not possible to quantify the increase in litigation which will result, but [the judges] are convinced it will occur.

The general concern seems to be that, in probate proceedings, the presumption of menace, duress, fraud, or undue influence provided under

Probate Code Section 21350 will arise as a matter of course, whenever a will includes a gift to a "disqualified person."

While the presumption is rebuttable, it is difficult to prove a negative (i.e., the absence of menace, duress, fraud, or undue influence), especially because existing law requires clear and convincing evidence to rebut the presumption. In addition, existing law assesses costs against a beneficiary who tries and fails to rebut the presumption. That acts as a deterrent to attempting to rebut the presumption.

For those reasons, some beneficiaries who are subject to the presumption may conclude that it is not worth the cost and effort to try to rebut the presumption and may simply walk away from the gift.

The proposed law would change the standard for rebutting the presumption to a simple preponderance of the evidence, and would remove a provision precluding rebuttal when a gift is made to the drafter of the donative instrument. Those changes increase the likelihood that a beneficiary will attempt to rebut the presumption, thereby increasing litigation to some extent.

On a related point, the proposed law would narrow the scope of the "care custodian" presumption, thereby excluding some gifts that are currently subject to the presumption (e.g., a gift from a 20 year old who is blind, to a neighbor who provides volunteer help around the house). The judges suggest that those gifts are likely to be contested anyway (under the common law), thereby increasing litigation to some extent.

However, in the absence of the statutory presumption, the burden of proof would fall on the contestant. In many cases, the contestant will not have sufficient evidence of fraud or undue influence to carry that burden and will decide not to file a contest. For that reason, the proposed narrowing of the care custodian presumption could also lead to some reduction in litigation.

Even if the judges are correct that the proposed law might lead to some net increase in litigation, there is another consideration to bear in mind. The Commission has concluded that existing law is overbroad, imposing a presumption of menace, duress, fraud, or undue influence in circumstances where it is not warranted. By doing so, it is impairing the testamentary freedom of all adults with disabilities, without regard for whether they are actually vulnerable to fraud or undue influence.

Those are significant substantive problems. It is not clear to the staff that they should be subordinated to concerns about a possible minor increase in litigation.

An overbroad rule that invalidates gifts that are freely and knowingly given (and has a disparate negative effect on those with disabilities) should not be sustained merely because it is easily administered.

RECENT CHANGE REGARDING THE WITNESSING OF WILLS

The proposed law would integrate the presumption of menace, duress, fraud, or undue influence that arises under Probate Code Section 6112(c)-(d) (when a will makes a gift to a necessary witness of the will) into the same statutory scheme as the presumption that arises under Section 21350. The most significant substantive changes that would result from that integration would be to generalize exceptions provided in existing Section 21351 so that they also apply to an interested witness of a will. Specifically, the proposed integration would create exceptions for an interested witness who is a spouse, domestic partner, cohabitant, or close relative of the testator; for a gift below a specified small gift minimum; or for a gift that is certified by an independent attorney.

The judges point to a recent amendment of Probate Code Section 6110(c)(2) and suggest that it might obviate the need to integrate Section 6112(c) into the general scheme provided in Sections 21350 *et seq.*:

> [The proposed changes to Section 6112 are] based on the CLRC study which preceded last year's enactment of section 6110(c)(2). This enactment significantly impacts the application of section 6112 and mitigates its negative effect on claimants. This change in circumstance reducing the impediment to taking may well eliminate the perceived need to change the statute. The current statute is well understood by the courts and the bar. The proposed amendments will likely generate litigation to settle its meaning and application, an effect which may be unnecessary because of the yet to be considered effect of last year's change.

Section 6110 was amended in 2008 as follows:

> 6110. (a) Except as provided in this part, a will shall be in writing and satisfy the requirements of this section.
> (b) The will shall be signed by one of the following:
> (1) By the testator.
> (2) In the testator's name by some other person in the testator's presence and by the testator's direction.
> (3) By a conservator pursuant to a court order to make a will under Section 2580.
> (c) <u>(1) Except as provided in paragraph (2),</u> the will shall be witnessed by being signed<u>, during the testator's lifetime,</u> by at least two persons each of whom (A) being present at the same time,

> witnessed either the signing of the will or the testator's acknowledgment of the signature or of the will and (B) understand that the instrument they sign is the testator's will.
>
> (2) If a will was not executed in compliance with paragraph (1), the will shall be treated as if it was executed in compliance with that paragraph if the proponent of the will establishes by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator's will.

2008 Cal. Stat. ch. 53.

The change in Section 6110(c)(2), which was sponsored by the Trusts and Estates Section of the State Bar, is intended to provide a "harmless error" rule to save a will from invalidity based solely on a technical defect in witnessing. See Senate Floor Analysis of AB 2248 (June 12, 2008), p. 2.

The staff does not understand the judges' concern. The addition of Section 6110(c)(2) helps to save an *improperly witnessed* will from invalidity.

By contrast, Section 6112(c) does not address the invalidity of an improperly witnessed will. Instead, it addresses the effect of a gift to a necessary witness of a *properly witnessed* will. See Section 6112(b) ("A will or any provision of a will is not invalid because the will is signed by an interested witness.").

The addition of a harmless error rule with respect to the overall validity of an improperly witnessed will does not seem to have any direct relevance to the question of whether the presumption arising under Section 6112 should be subject to the exceptions provided in Section 21351 (i.e., for family, small gifts, and gifts certified by an independent attorney).

MEANING OF "REMUNERATION"

The proposed law would narrow the definition of "care custodian" so as to limit it to a person who provides services "for remuneration, as a profession or occupation. The remuneration need not be paid by the dependent adult." See proposed Prob. Code § 21362(a).

The judges are concerned that this definition is ambiguous, because "remuneration" could encompass the gift that is at issue:

> [SB 105] makes changes to section 21366 and provides that only those who provide services for remuneration are encompassed within the revised definition. This contains an ambiguity which will provoke litigation to determine whether remuneration includes the anticipated inheritance. The problem is that an inheritance is "donative," a gift, which appears to be inconsistent

> with payment for services. However, it is not uncommon for such a "gift" to be traded for services to the "donating" individual.

The construction noted by the judges is possible, though it strikes the staff as improbable. It seems unlikely that many people have the "profession or occupation" of providing care services in exchange for future gifts. The exchange of present services for a future inheritance seems much more likely in the context of family members (who are exempt from the presumption arising under the existing and proposed law).

In any event, it might be helpful to add a clarification, either in the statute or in the Comment, along these lines:

> 21362. (a) "Care custodian" means a person who provides health or social services to a dependent adult for remuneration, as a profession or occupation. The remuneration need not be paid by the dependent adult. "Remuneration" does not include the gift at issue under this chapter.
>
> …

The staff is not sure that such a change is necessary, but it should be harmless and might be helpful in some situations. **Should an amendment along those lines be recommended to Senator Harman?**

UNIFORM DEFINITION OF "DEPENDENT ADULT"

The existing definition of "dependent adult" that is used in connection with the care custodian presumption is drawn from a statute governing abuse of elders and dependent adults. The existing definition effectively encompasses any adult with a disability.

While that breadth may be appropriate in a statute aimed at protecting dependent adults from abuse, it is problematic when applied to the care custodian presumption provided in Section 21350. In that context, it erects significant obstacles to gift-giving by persons with disabilities as a class, that do not apply to persons who do not have disabilities.

The modern trend in California is to employ a functional test when evaluating whether a person has the mental capacity to make decisions. See, e.g., Prob. Code §§ 810-813. The proposed law would follow that trend, by replacing the existing class-based definition, which includes all persons with disabilities, with a functional test based on the standard used by courts to determine whether a person needs to be conserved. See Prob. Code § 1801(a)-(b).

The judges are concerned that use of a different definition of "dependent adult" in the proposed law could complicate the coordination of related actions:

> [SB 105] materially changes the definition of "dependent adult" (the person protected by the disqualified persons statutes) utilized by those statutes. In substance, the existing statutes use the definitions contained in Welfare & Institutions Code Sections 15610.23 and 15610.27 relating to elder abuse. Last year the legislature made explicit that elder abuse actions may be heard in probate, based in part it may be supposed on the common definition of the protected party and in part on the typical circumstances which give rise to either action also give rise to the other. [SB 105], by ending the common definition, depart from an effort to consolidate issues and proceedings.

The staff requested clarification as to what new provision was being referenced. It is the addition of Welfare and Institutions Code Section 15657.3(a):

> The department of the superior court having jurisdiction over probate conservatorships shall also have concurrent jurisdiction over civil actions and proceedings involving a claim for relief arising out of the abduction, as defined in Section 15610.06, or the abuse of an elderly or dependent adult, if a conservator has been appointed for the plaintiff prior to the initiation of the action for abuse.

See 2008 Cal. Stat. ch. 48.

The staff does not understand the judges' concern. Section 15657.3 calls for coordination of actions in the probate court only *after a conservator has been appointed for the person who is the subject of the proceedings*. The proposed law would use the existing standard for appointment of a conservator in defining "dependent adult." It would therefore seem that the definition of "dependent adult" used in the proposed law would always be satisfied in the coordinated proceedings (because a court would already have decided that the standard for appointment of a conservator had been met). If so, the change in the definition might facilitate the coordination of actions involving conservatorship, the statutory presumption, and elder abuse.

It may be that the judges see *any* deviation from the definition of "dependent adult" used in the elder abuse statute as problematic. However, existing Section 21350 *already* uses a modified version of that definition. Under the abuse statute, a "dependent adult" is limited to a person between the ages of 18 and 64. Welf. & Inst. Code § 15610.23. A person who is 65 or older is an "elder." Welf. & Inst. Code § 15610.27.

By contrast, existing Section 21350 extends the age element of the definition of "dependent adult" to include any person over the age of 17.

Thus, a person might be a dependent adult under Probate Code Section 21350, but *not* be a dependent adult under Welfare and Institutions Code Section 15610.23.

If that sort of inconsistency in defining "dependent adult" is a problem, it is a problem that already exists.

More substantively, while it would be unfortunate if the proposed definition of "dependent adult" were to create any confusion or procedural complications, it is not clear to the staff that this is a sufficient reason to retain a definition that is substantively overbroad. While judicial efficiency and ease of administration are important, they should take a back seat to achieving the correct substantive outcome (e.g., a person should not be deprived of a freely and knowingly given gift simply to facilitate the coordination of proceedings).

Respectfully submitted,

Brian Hebert
Executive Secretary