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Memorandum 2010-14

2010 Legislative Program: Status of SB 105 (Harman)

SB 105 (Harman) was introduced in 2009 to implement the Commission's recommendation on *Donative Transfer Restrictions*, 38 Cal. L. Revision Comm'n Reports 107 (2008). The bill was approved by the Senate on May 14, 2009.

The bill was taken off calendar in the Assembly and made into a two-year bill, in order to provide more time to address the concerns of the California Judges Association.

Discussions about possible amendments to the bill are ongoing. As soon as Senator Harman has provisionally decided how to amend the bill, the staff will brief the Commission.

This memorandum provides background on a recent appellate decision that addresses issues relevant to the proposed law.

OVERVIEW OF EXISTING LAW

Under existing law, a gift to a specified type of "disqualified person" is presumed to be the product of menace, duress, fraud, or undue influence and therefore invalid. Prob. Code § 21350.

The class of disqualified persons includes the drafter of the instrument making the gift, a fiduciary of the donor who transcribes the instrument making the gift, the "care custodian" of a donor who is a "dependent adult," and various family members and business associates of the foregoing. *Id.*

There are a number of exceptions to this rule, including an exception for family members of the donor (within a certain specified degree of kinship). Prob. Code § 21351(a).

The statutory presumption can be avoided entirely if an "independent attorney" counsels the donor and signs a "certificate of independent review"

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). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

expressing the attorney's conclusion that the gift was not the product of menace, duress, fraud, or undue influence.

ESTATE OF WINANS

A recent appellate decision addressed the requirements for an effective certificate of independent review. See *Estate of Winans*, ___ Cal. Rptr. 3d. ___, WL 1078001 (2010).

In that case, Eugene Winans, a dependent adult, had executed a will that made a large gift to his care custodian. Prior to execution of the will, Mr. Winans' attorney had counseled him about the effect of the will and signed a certificate of independent review.

Disappointed heirs contested the will, relying in part on Section 21350 to invalidate the gift to the care custodian. Because a certificate of independent review had been signed by an independent attorney, the trial court granted summary judgment for the care custodian.

The appellate court reversed, finding that there were triable issues of fact that precluded summary judgment. Specifically, there were questions as to whether the attorney who signed the certificate was an "independent attorney," whether the extent of counseling provided by the attorney prior to signing the certificate satisfied the statute, and whether that counseling was sufficiently "confidential."

The extent to which those questions would be addressed by SB 105 is discussed below.

Meaning of "Independent Attorney"

Section 21351 requires that the certificate of independent review be prepared by an independent attorney. The existing statute does not define the term "independent attorney." That is one of the gaps that SB 105 would fill.

Proposed Section 21370 would define the term as follows:

> **§ 21370. "Independent attorney"**
>
> 21370. "Independent attorney" means an attorney who has no legal, business, financial, professional, or personal relationship with the beneficiary of a donative transfer at issue under this part.
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> **Comment.** Section 21370 is new. The standard provided in this section is similar to California Rules of Professional Conduct 3-310(B)(1) and (3). See also Section 21384 (independent attorney review).

The proposed definition would use an established standard for determining the degree of independence required. As under existing law, the definition would require independence from the beneficiary. See Section 21351(b) (requiring that attorney be "so disassociated from the interest of the transferee" as to be able to provide independent, impartial, and confidential advice to client).

The *Winans* court reached a different conclusion. While recognizing that the only relevant language in the existing statute speaks of independence from the interests *of the beneficiary*, it held that a broader degree of independence is required. Specifically, the court held that an "independent attorney" is one whose "personal circumstances do not prevent him or her from forming a disinterested judgment about the validity of the bequest." *Winans* at 10-11.

For example, the attorney who signed the certificate of independent review in *Winans* had no interest in the beneficiary of the contested gift, but was named in the will as the executor. The court suggested that the attorney's interest in receiving the large executor's fee was enough to create a triable issue of fact as to whether the attorney was sufficiently disinterested.

In considering that possibility, it is important to understand that Section 21350 can *only* be used to challenge a gift to a disqualified person. Section 21350 has *no effect on any other provisions of a donative instrument* containing a challenged gift. Thus, even if the gift to Mr. Winans' care custodian were invalidated under Section 21350, that decision would have no effect on the overall validity of the will and would therefore have no effect on the provision designating the attorney as executor. Consequently, it was not necessary for the attorney to certify the validity of the gift to the care custodian in order to preserve the validity of the executor provision.

With that in mind, the court seems to be suggesting a different kind of interest — the attorney might have decided to certify the validity of the gift to the care custodian out of fear that a refusal to do so could offend Mr. Winans and cause him to find another executor.

That is a very broad basis for disqualification. It would suggest that any attorney who has any kind of business connection to the donor could potentially be barred from certifying a gift to a disqualified person. An attorney who drafts a will could be barred. An attorney chosen to serve as executor could be barred. An attorney assisting the donor with other legal matters could be barred. By necessity, the donor would need to seek out a stranger to certify the gift.

In preparing its recommendation, the Commission considered a similar point: whether the attorney who drafts a donative instrument should be barred from signing a certificate of independent review because of the attorney's interest in validating his or her own work and receiving fees from the donor. See Memorandum 2008-18, pp. 7-9. The Commission decided against defining "independent attorney" so as to exclude an attorney who is representing the donor, merely because of the attorney's interest in that work.

The Commission had two general reasons for that decision. First, it is likely that an attorney with an established relationship with a donor will be in the best position to assess whether the donor is acting freely and knowingly in making a gift. Second, if donors are forced to find a new attorney to conduct the independent review, the added cost, delay, and hassle could cause some donors to skip the independent review step, thereby putting an intended gift at risk of invalidation under Section 21350.

In addition, the staff believes it is important that the certificate of independent review be reliable in its operation. When a donor goes to the added expense to have the validity of a gift certified, the donor does so to avoid any post-death challenge of that gift under Section 21350. The donor should be able to rely with some certainty on the effect of the certificate.

Under the standard adopted in *Winans*, the reliability of a certificate of independent review would be significantly undermined. Rather than providing a basis for summary judgment in a Section 21350 contest, the certificate would itself become an issue in litigation. Contestants could attack the validity of the certificate on the grounds that the attorney who prepared it had some "personal circumstance" that affected the attorney's ability to evaluate the validity of the instrument. There is no bright line test that can be applied to answer that contention.

The Commission's recommendation, as implemented in SB 105, would add a statutory definition of "independent attorney." The proposed definition would only require independence from the beneficiary of the challenged gift. That would reverse the holding in *Winans*. However, the *Winans* court was only construing existing law, not making new policy. For the reasons discussed above, the Commission recommended a different policy result.

Scope of Counseling

Section 21351(b) does not say much about the type of counseling that an independent attorney must provide to a donor before signing a certificate of independent review. It only requires that the attorney counsel the client about "the nature and consequences of the intended transfer."

In *Winans*, the court held that counseling about the "consequences" of an intended transfer must include discussion of those who will receive property as well as discussion of the donor's heirs who will *not* receive property. *Id.* at 7. In other words, when counseling about the effect of a donative instrument, the counselor must make sure that the donor understands who is being left out.

Although the Commission did not recommend any elaboration of the meaning of "counseling" in Section 21351(b), the court's understanding of the term makes sense. In fact, when SB 105 was reviewed by a consultant of the Assembly Committee on Judiciary, it was suggested that the bill be amended to address the same point. Specifically, it was suggested that the language be amended to require that counseling include discussion of "the effect of the intended transfer on the transferor's heirs."

Senator Harman has not yet made a decision on the proposed amendment. It is interesting to note that the issue to be addressed by the amendment has actually arisen in an appellate case.

Confidentiality of Counseling

Section 21351(b) requires that an independent attorney be in a position to counsel the donor "independently, impartially, and confidentially as to the consequences of the transfer." In *Winans*, the court found a triable issue of fact as to whether the counseling had been "confidential." This was in part because the care custodian beneficiary was in and out of the room where the counseling was taking place and was often within earshot. *Id.* at 8.

In discussing the confidentiality requirement, the court was unwilling to adopt a bright line rule. Instead the court concluded that the counseling must occur

> under circumstances that would insulate the transferor from any improper influences giving rise to the donative transfer and encourage the transferor to speak frankly with the certifying attorney about those influences, if any. At a minimum, therefore, the disqualified person and any person associated with the disqualified person must be absent. Further, the counseling session

> must occur in the absence of any person whose presence might discourage the testator from speaking frankly with the attorney about the subject bequest.

As discussed earlier in this memorandum, it is important that the independent attorney certification process be grounded in bright line concepts. Otherwise, a mechanism designed to permit a donor to avoid post-death litigation could itself become the subject of post-death litigation.

The standard adopted in *Winans* is very protective, but is not a bright line test. For example, suppose that a dependent adult proposes to make a gift to his care custodian, a live-in attendant. He is very ill and cannot participate in counseling without being attended. During the counseling, the beneficiary of the gift is absent. Instead, the donor hires a temporary nurse to attend him. The attorney conducts the counseling and certifies the validity of the gift. Under *Winans*, the certificate of independent review could be attacked on the theory that the presence of the temporary nurse somehow discouraged the donor from speaking frankly. The possibility of making such an attack on the certificate would significantly undermine its value as a reliable way of precluding a post-death Section 21350 contest.

Again, the Commission did not recommend any elaboration of the meaning of "confidential" counseling, but the Assembly committee consultant did. Specifically, the consultant suggested that the language be amended to require that counseling be conducted "out of the presence of any proposed beneficiary." That would achieve the "minimum" proposed in *Winans*, requiring that the subject of the counseling be out of the room when the counseling takes place. The proposed amendment would use a bright line test.

In considering that suggestion, the staff wonders whether it might make sense to slightly broaden the concept. Should all "heirs" of the donor be barred from the counseling session, including heirs who are not proposed beneficiaries? It seems likely that the presence of a disinherited family member could meaningfully discourage frank discussion. **Should the staff suggest that minor refinement of the proposal to Senator Harman?**

Respectfully submitted,

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Executive Secretary