

Memorandum 2010-22

2010 Legislative Program: Status of SB 105 (Harman)

Senate Bill 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 concerns raised by the California Judges Association ("CJA").

Discussions about possible amendments to the bill have been ongoing since then. Unfortunately, it is not possible to describe the content of those discussions at this time.

This memorandum is presented to briefly review the background of the Commission's recommendation and to provide a copy of SB 105 (attached). This will help to lay the groundwork for whatever further discussion might be possible at the Commission's June 15 meeting.

Note that Sections 2 through 6 of SB 105 were enacted last year, as part of SB 308 (Harman). See 2009 Cal. Stat. ch. 348. Those bill sections will be deleted from SB 105 and do not need to be considered in connection with this memorandum.

EXISTING LAW

Probate Code Sections 21350-21356 establish a statutory presumption of menace, duress, fraud, or undue influence when a donative transfer is made to a person who stands in a specified relationship to the transferor. The statute covers the following types of "disqualified persons":

- (1) **The drafter of the donative instrument.** In addition, certain associates of the drafter are also disqualified persons, including a spouse, domestic partner, cohabitant, or relative within the

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.

specified degree of kinship of the drafter, as well as a partner, shareholder, or employee of a law partnership or corporation in which the drafter has an ownership interest. Prob. Code § 21350(a)(1)-(3).

- (2) **A fiduciary of the transferor who transcribed the donative instrument or caused it to be transcribed.** Again, some associates of the disqualified person are also subject to the presumption, including the spouse, domestic partner, cohabitant, or relative within the specified degree of kinship of the transcriber. An “employee” of the transcriber is also a disqualified person. Prob. Code § 21350(a)(4)-(5).
- (3) **The “care custodian” of a transferor who is a “dependent adult.”** As before, the spouse, domestic partner, cohabitant, or specified relative of the care custodian is also a disqualified person. Prob. Code § 21350(a)(6)-(7). Note that “care custodian” and “dependent adult” are defined terms.

There are some important exceptions to the application of the statutory presumption. It does not apply to a spouse, domestic partner, cohabitant, or close family member of the transferor or to an instrument drafted by such a person. Prob. Code § 21351(a). There is also an exception that applies if the transferor is counseled by an “independent attorney” who then certifies that the proposed transfer is not the product of menace, duress, fraud, or undue influence. Prob. Code § 21351(b).

As a general rule, the presumption may be rebutted. However, to do so the proponent of the gift must produce “clear and convincing” rebuttal evidence. Prob. Code § 21351(d). The evidence must include at least some evidence other than the testimony of the beneficiary. *Id.*

However, in the case of a gift to the *drafter* of the donative instrument, the presumption is conclusive. Prob. Code § 21351(e)(1).

A beneficiary who tries unsuccessfully to rebut the presumption bears the cost of the proceeding, including reasonable attorney’s fees. Prob. Code § 21351(d).

If a gift is invalidated pursuant to the statutory presumption, the donative transfer operates “as if the disqualified person predeceased the transferor without spouse or issue....” Prob. Code § 21353. In other words, the invalidation of one gift in a will or trust would not affect the remaining provisions of the instrument. Presumably the property that would have been transferred under the invalidated provision would fall into the residue of the estate.

Finally, it is worth noting that the statutory presumption of menace, duress, fraud, or undue influence *supplements* the common law. It does not displace it. See *Bernard v. Foley*, 39 Cal. 4th 794, 800, 139 P.3d 1196, 47 Cal. Rptr. 3d 248 (2006); *Rice v. Clark*, 28 Cal. 4th 89, 96-97, 47 P.3d 300, 120 Cal. Rptr. 2d 522, (2002); *Estate of Winans*, ___ Cal. Rptr. 3d. ___, WL 1078001 (2010). Thus, even if a gift could not be challenged under the statutory presumption, it could still be challenged under the common law. (The proposed law would codify this point. See proposed Prob. Code § 21392(b).)

LEGISLATIVE DIRECTION TO THE COMMISSION

The Legislature directed the Commission to study the statutory presumption of undue influence and recommend improvements. In doing so, the Commission was to consider the effectiveness of the statute in protecting transferors from fraud and undue influence, “while still ensuring the freedom of transferors to dispose of their estates as they desire and reward true ‘good Samaritans’....” Thus:

SECTION 1. (a) The California Law Revision Commission shall study the operation and effectiveness of the provisions of the Probate Code restricting donative transfers to certain classes of individuals, and shall recommend revisions and improvements to those provisions. The commission shall report all of its findings to the Legislature on or before January 1, 2009.

(b) In considering the overall effectiveness of the current statutory scheme in protecting prospective transferors from fraud, menace, or undue influence, while still ensuring the freedom of transferors to dispose of their estates as they desire and reward true “good Samaritans,” the commission shall address the following specific issues:

(1) Whether the potential for abuse by care custodians militates in favor of creating a separate, more restrictive, regulatory scheme for donative transfers to that class and how the common law presumption of undue influence that arises when a person having a confidential relationship with a transferor, who actively participates in the transfer and unduly benefits from it, bears on this.

(2) Whether the provisions concerning gifts to care custodians should be moved to a separate section of the Probate Code.

(3) Whether the definition of “care custodian” contained in subdivision (c) of Section 21350 of the Probate Code should be changed and whether it should include long time family friends,

nonprofessional caregivers who have a preexisting relationship with the transferor, or other “good Samaritans.”

(4) Whether it should be necessary to have a second attorney, rather than the drafting attorney, sign a certificate of independent review in cases in which the drafting attorney is independent of the transferee.

(5) Whether the potential for fraud, menace, or undue influence by a drafting attorney in cases where the drafting attorney, his or her employees, or family, relatives, or any person with a close relationship to the drafting attorney is a transferee, should be addressed in the statute. Also, whether the uses of the drafting attorney’s testimony is or should be limited pursuant to subdivision (d) of Section 21351 of the Probate Code, in cases in which that attorney is independent, and if so, whether the statute should be changed accordingly.

(6) What is or should be the meaning of the phrase “not based solely upon the testimony of any person described in subdivision (a) of Section 21350” contained in subdivision (d) of Section 21351 of the Probate Code, and to what extent there is an actual need for a limitation on testimony.

(7) Whether donative transfers to care custodians should be invalid if the transferor executes the instrument making the donative transfer within a given period after the relationship between the donor and the care custodian begins.

2006 Cal. Stat. ch. 215 (AB 2034 (Spitzer)).

SUMMARY OF RECOMMENDATION

The principal reforms that were recommended by the Commission and included in SB 105 are as follows:

- Limit the statutory presumption to cover only fraud and undue influence (eliminating any presumption of menace or duress).
- Limit the definition of “care custodian” to a person who provides health or social services for remuneration, as a profession or occupation (thereby excluding gifts to personal friends and other volunteers from the scope of the presumption).
- Change the definition of “dependent adult,” which currently applies to persons with disabilities as a class, to instead use an individualized functional test, based on whether a person is able to provide for personal needs, manage finances, and resist fraud or undue influence.
- Limit the application of the care custodian presumption to donative instruments executed during the time in which care services are provided.

- Harmonize the statutory presumption with the similar presumption that arises under Probate Code Section 6112.
- Eliminate special evidentiary restrictions on rebutting the statutory presumption.
- Allow a drafting attorney to conduct an “independent attorney” review of a gift to a care custodian, provided that the attorney has no interest in the beneficiary.
- Eliminate the special statute of limitations for actions under the statute.
- Add a provision making clear that the statute does not preclude any other available remedy, including the common law on undue influence.

The proposed law would also make numerous technical changes that are necessary to eliminate confusing or inconsistent language in the existing statute.

Respectfully submitted,

Brian Hebert
Executive Secretary

Introduced by Senator Harman

January 27, 2009

An act to amend Section 6103.6 of the Business and Professions Code, to amend Sections 366.2 and 366.3 of the Code of Civil Procedure, and to amend Sections 1303, 1304, 2583, 6112, 15642, 16062, and 21310 of, to add Section 13 to, to add Part 3.5 (commencing with Section 21360) to Division 11 of, and to repeal Part 3.5 (commencing with Section 21350) of Division 11 of, the Probate Code, relating to donative transfers.

LEGISLATIVE COUNSEL'S DIGEST

SB 105, as introduced, Harman. Donative transfers: restrictions.

Existing law generally prohibits an instrument from making a donative transfer to the person who drafted or transcribed the instrument and certain other disqualified persons. This provision is subject to specified exceptions, including when the instrument is reviewed by an independent attorney who counsels the client about the nature and consequences of the intended transfer, attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and signs and delivers to the transferor a certificate of independent review.

This bill would revise and recast these provisions to establish an express presumption of fraud or undue influence when a donative instrument makes a gift to the person who drafted or transcribed the instrument, and certain other disqualified persons. The bill would define relevant terms for purposes of these provisions and make other technical and conforming changes.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 6103.6 of the Business and Professions
2 Code is amended to read:

3 6103.6. Violation of Section 15687 of the Probate Code, or of
4 Part 3.5 (commencing with Section ~~21350~~ 21360) of Division 11
5 of the Probate Code, shall be grounds for discipline, if the attorney
6 knew or should have known of the facts leading to the violation.
7 This section shall only apply to violations that occur on or after
8 January 1, 1994.

9 SEC. 2. Section 366.2 of the Code of Civil Procedure is
10 amended to read:

11 366.2. (a) If a person against whom an action may be brought
12 on a liability of the person, whether arising in contract, tort, or
13 otherwise, and whether accrued or not accrued, dies before the
14 expiration of the applicable limitations period, and the cause of
15 action survives, an action may be commenced within one year
16 after the date of death, and the limitations period that would have
17 been applicable does not apply.

18 (b) The limitations period provided in this section for
19 commencement of an action shall not be tolled or extended for
20 any reason except as provided in any of the following, where
21 applicable:

- 22 (1) Sections 12, 12a, and 12b of this code.
- 23 (2) Part 4 (commencing with Section 9000) of Division 7 of the
24 Probate Code (creditor claims in administration of estates of
25 decedents).
- 26 (3) Part 8 (commencing with Section 19000) of Division 9 of
27 the Probate Code (payment of claims, debts, and expenses from
28 revocable trust of deceased settlor).
- 29 (4) *Former Part 3 (commencing with Section 21300) of Division*
30 *11 of the Probate Code (no contest clauses), as that part read prior*
31 *to its repeal by Chapter 174 of the Statutes of 2008.*

32 (c) This section applies to actions brought on liabilities of
33 persons dying on or after January 1, 1993.

34 SEC. 3. Section 366.3 of the Code of Civil Procedure is
35 amended to read:

36 366.3. (a) If a person has a claim that arises from a promise
37 or agreement with a decedent to distribution from an estate or trust
38 or under another instrument, whether the promise or agreement

1 was made orally or in writing, an action to enforce the claim to
2 distribution may be commenced within one year after the date of
3 death, and the limitations period that would have been applicable
4 does not apply.

5 (b) The limitations period provided in this section for
6 commencement of an action shall not be tolled or extended for
7 any reason except as provided in Sections 12, 12a, and 12b of this
8 code, and *former* Part 3 (commencing with Section 21300) of
9 Division 11 of the Probate Code, *as that part read prior to its*
10 *repeal by Chapter 174 of the Statutes of 2008.*

11 (c) This section applies to actions brought on claims concerning
12 persons dying on or after the effective date of this section.

13 SEC. 4. Section 13 is added to the Probate Code, to read:

14 13. (a) The degree of kinship or consanguinity between two
15 persons is determined by counting the number of generations
16 separating those persons, pursuant to subdivision (b) or (c). Each
17 generation is called a degree.

18 (b) Lineal kinship or consanguinity is the relationship between
19 two persons, one of whom is a direct descendant of the other. The
20 degree of kinship between those persons is determined by counting
21 the generations separating the first person from the second person.
22 In counting the generations, the first person is excluded and the
23 second person is included. For example, parent and child are related
24 in the first degree of lineal kinship or consanguinity, grandchild
25 and grandparent are related in the second degree, and
26 great-grandchild and great-grandparent are related in the third
27 degree.

28 (c) Collateral kinship or consanguinity is the relationship
29 between two people who spring from a common ancestor, but
30 neither person is the direct descendent of the other. The degree of
31 kinship is determined by counting the generations from the first
32 person up to the common ancestor and from the common ancestor
33 down to the second person. In counting the generations, the first
34 person is excluded, the second person is included, and the common
35 ancestor is counted only once. For example, siblings are related
36 in the second degree of collateral kinship or consanguinity, an aunt
37 or uncle and a niece or nephew are related in the third degree, and
38 first cousins are related in the fourth degree.

39 SEC. 5. Section 1303 of the Probate Code is amended to read:

1 1303. With respect to a decedent’s estate, the grant or refusal
2 to grant the following orders is appealable:

3 (a) Granting or revoking letters to a personal representative,
4 except letters of special administration or letters of special
5 administration with general powers.

6 (b) Admitting a will to probate or revoking the probate of a will.

7 (c) Setting aside a small estate under Section 6609.

8 (d) Setting apart a probate homestead or property claimed to be
9 exempt from enforcement of a money judgment.

10 (e) Granting, modifying, or terminating a family allowance.

11 (f) Determining heirship, succession, entitlement, or the persons
12 to whom distribution should be made.

13 (g) Directing distribution of property.

14 (h) Determining that property passes to, or confirming that
15 property belongs to, the surviving spouse under Section 13656.

16 (i) Authorizing a personal representative to invest or reinvest
17 surplus money under Section 9732.

18 (j) Determining whether an action constitutes a contest under
19 *former* Chapter 2 (commencing with Section 21320) of Part 3 of
20 Division 11, *as that chapter read prior to its repeal by Chapter*
21 *174 of the Statutes of 2008.*

22 (k) Determining the priority of debts under Chapter 3
23 (commencing with Section 11440) of Part 9 of Division 7.

24 (l) Any final order under Chapter 1 (commencing with Section
25 20100) or Chapter 2 (commencing with Section 20200) of Division
26 10.

27 SEC. 6. Section 1304 of the Probate Code is amended to read:

28 1304. With respect to a trust, the grant or denial of the
29 following orders is appealable:

30 (a) Any final order under Chapter 3 (commencing with Section
31 17200) of Part 5 of Division 9, except the following:

32 (1) Compelling the trustee to submit an account or report acts
33 as trustee.

34 (2) Accepting the resignation of the trustee.

35 (b) Any final order under Chapter 2 (commencing with Section
36 19020) of Part 8 of Division 9.

37 (c) Any final order under Part 1 (commencing with Section
38 20100) and Part 2 (commencing with Section 20200) of Division
39 10.

1 (d) Determining whether an action constitutes a contest under
2 *former* Chapter 2 (commencing with Section 21320) of Part 3 of
3 Division 11, *as that chapter read prior to its repeal by Chapter*
4 *174 of the Statutes of 2008.*

5 SEC. 7. Section 2583 of the Probate Code is amended to read:
6 2583. In determining whether to authorize or require a proposed
7 action under this article, the court shall take into consideration all
8 the relevant circumstances, which may include, but are not limited
9 to, the following:

10 (a) Whether the conservatee has legal capacity for the proposed
11 transaction and, if not, the probability of the conservatee's recovery
12 of legal capacity.

13 (b) The past donative declarations, practices, and conduct of
14 the conservatee.

15 (c) The traits of the conservatee.

16 (d) The relationship and intimacy of the prospective donees
17 with the conservatee, their standards of living, and the extent to
18 which they would be natural objects of the conservatee's bounty
19 by any objective test based on such relationship, intimacy, and
20 standards of living.

21 (e) The wishes of the conservatee.

22 (f) Any known estate plan of the conservatee (including, but
23 not limited to, the conservatee's will, any trust of which the
24 conservatee is the settlor or beneficiary, any power of appointment
25 created by or exercisable by the conservatee, and any contract,
26 transfer, or joint ownership arrangement with provisions for
27 payment or transfer of benefits or interests at the conservatee's
28 death to another or others which the conservatee may have
29 originated).

30 (g) The manner in which the estate would devolve upon the
31 conservatee's death, giving consideration to the age and the mental
32 and physical condition of the conservatee, the prospective devisees
33 or heirs of the conservatee, and the prospective donees.

34 (h) The value, liquidity, and productiveness of the estate.

35 (i) The minimization of current or prospective income, estate,
36 inheritance, or other taxes or expenses of administration.

37 (j) Changes of tax laws and other laws which would likely have
38 motivated the conservatee to alter the conservatee's estate plan.

1 (k) The likelihood from all the circumstances that the
2 conservatee as a reasonably prudent person would take the
3 proposed action if the conservatee had the capacity to do so.

4 (l) Whether any beneficiary is ~~a person described in paragraph~~
5 ~~(1) of subdivision (b) of Section 21350~~ *the spouse or domestic*
6 *partner of the conservatee.*

7 (m) Whether a beneficiary has committed physical abuse,
8 neglect, false imprisonment, or fiduciary abuse against the
9 conservatee after the conservatee was substantially unable to
10 manage his or her financial resources, or resist fraud or undue
11 influence, and the conservatee’s disability persisted throughout
12 the time of the hearing on the proposed substituted judgment.

13 SEC. 8. Section 6112 of the Probate Code is amended to read:

14 6112. (a) Any person generally competent to be a witness may
15 act as a witness to a will.

16 (b) A will or any provision thereof is not invalid because the
17 will is signed by an interested witness.

18 ~~(e) Unless there are at least two other subscribing witnesses to~~
19 ~~the will who are disinterested witnesses, the fact that the will makes~~
20 ~~a devise to a subscribing witness creates a presumption that the~~
21 ~~witness procured the devise by duress, menace, fraud, or undue~~
22 ~~influence. This presumption is a presumption affecting the burden~~
23 ~~of proof. This presumption does not apply where the witness is a~~
24 ~~person to whom the devise is made solely in a fiduciary capacity.~~

25 ~~(d) If a devise made by the will to an interested witness fails~~
26 ~~because the presumption established by subdivision (e) applies to~~
27 ~~the devise and the witness fails to rebut the presumption, the~~
28 ~~interested witness shall take such proportion of the devise made~~
29 ~~to the witness in the will as does not exceed the share of the estate~~
30 ~~which would be distributed to the witness if the will were not~~
31 ~~established. Nothing in this subdivision affects the law that applies~~
32 ~~where it is established that the witness procured a devise by duress,~~
33 ~~menace, fraud, or undue influence.~~

34 ~~(c) A devise to a subscribing witness is governed by Section~~
35 ~~21380.~~

36 SEC. 9. Section 15642 of the Probate Code is amended to read:

37 15642. (a) A trustee may be removed in accordance with the
38 trust instrument, by the court on its own motion, or on petition of
39 a settlor, cotrustee, or beneficiary under Section 17200.

1 (b) The grounds for removal of a trustee by the court include
2 the following:

3 (1) Where the trustee has committed a breach of the trust.

4 (2) Where the trustee is insolvent or otherwise unfit to administer
5 the trust.

6 (3) Where hostility or lack of cooperation among cotrustees
7 impairs the administration of the trust.

8 (4) Where the trustee fails or declines to act.

9 (5) Where the trustee’s compensation is excessive under the
10 circumstances.

11 (6) Where the sole trustee is a person described in subdivision
12 (a) of Section ~~21350~~ 21380, whether or not the person is the
13 transferee of a donative transfer by the transferor, unless, based
14 upon any evidence of the intent of the settlor and all other facts
15 and circumstances, which shall be made known to the court, the
16 court finds that it is consistent with the settlor’s intent that the
17 trustee continue to serve and that this intent was not the product
18 of fraud, ~~menace~~, ~~duress~~, or undue influence. Any waiver by the
19 settlor of this provision is against public policy and shall be void.
20 This paragraph shall not apply to instruments that became
21 irrevocable on or before January 1, 1994. This paragraph shall not
22 apply if any of the following conditions are met:

23 (A) The settlor is related by blood or marriage to, or is a
24 cohabitant with, any one or more of the trustees, the person who
25 drafted or transcribed the instrument, or the person who caused
26 the instrument to be transcribed.

27 (B) The instrument is reviewed by an independent attorney who
28 (1) counsels the settlor about the nature of his or her intended
29 trustee designation and (2) signs and delivers to the settlor and the
30 designated trustee a certificate in substantially the following form:

31
32 “CERTIFICATE OF INDEPENDENT REVIEW

33 I, _____, have reviewed

34 (attorney’s name)

35 _____ and have counseled my client,

36 (name of instrument)

37 _____, fully and privately on the nature and

38 (name of client)

39 legal effect of the designation as trustee of _____

40 (name of trustee)

1
 2 contained in that instrument. I am so disassociated from the interest of the
 3 person named as trustee as to be in a position to advise my client impartially
 4 and confidentially as to the consequences of the designation. On the basis of
 5 this counsel, I conclude that the designation of a person who would otherwise
 6 be subject to removal under paragraph (6) of subdivision (b) of Section 15642
 7 of the Probate Code is clearly the settlor’s intent and that intent is not the
 8 product of fraud, ~~menace, duress,~~ or undue influence.

9
 10 _____”
 11 (Name of Attorney) (Date)
 12

13 This independent review and certification may occur either before
 14 or after the instrument has been executed, and if it occurs after the
 15 date of execution, the named trustee shall not be subject to removal
 16 under this paragraph. Any attorney whose written engagement
 17 signed by the client is expressly limited to the preparation of a
 18 certificate under this subdivision, including the prior counseling,
 19 shall not be considered to otherwise represent the client.

20 (C) After full disclosure of the relationships of the persons
 21 involved, the instrument is approved pursuant to an order under
 22 Article 10 (commencing with Section 2580) of Chapter 6 of Part
 23 4 of Division 4.

24 (7) If, as determined under Part 17 (commencing with Section
 25 810) of Division 2, the trustee is substantially unable to manage
 26 the trust’s financial resources or is otherwise substantially unable
 27 to execute properly the duties of the office. When the trustee holds
 28 the power to revoke the trust, substantial inability to manage the
 29 trust’s financial resources or otherwise execute properly the duties
 30 of the office may not be proved solely by isolated incidents of
 31 negligence or improvidence.

32 (8) If the trustee is substantially unable to resist fraud or undue
 33 influence. When the trustee holds the power to revoke the trust,
 34 substantial inability to resist fraud or undue influence may not be
 35 proved solely by isolated incidents of negligence or improvidence.

36 (9) For other good cause.

37 (c) If, pursuant to paragraph (6) of subdivision (b), the court
 38 finds that the designation of the trustee was not consistent with
 39 the intent of the settlor or was the product of fraud, ~~menace, duress,~~

1 or undue influence, the person being removed as trustee shall bear
2 all costs of the proceeding, including reasonable attorney’s fees.

3 (d) If the court finds that the petition for removal of the trustee
4 was filed in bad faith and that removal would be contrary to the
5 settlor’s intent, the court may order that the person or persons
6 seeking the removal of the trustee bear all or any part of the costs
7 of the proceeding, including reasonable attorney’s fees.

8 (e) If it appears to the court that trust property or the interests
9 of a beneficiary may suffer loss or injury pending a decision on a
10 petition for removal of a trustee and any appellate review, the court
11 may, on its own motion or on petition of a cotrustee or beneficiary,
12 compel the trustee whose removal is sought to surrender trust
13 property to a cotrustee or to a receiver or temporary trustee. The
14 court may also suspend the powers of the trustee to the extent the
15 court deems necessary.

16 (f) For purposes of this section, the term “related by blood or
17 marriage” shall include persons within the seventh degree.

18 SEC. 10. Section 16062 of the Probate Code is amended to
19 read:

20 16062. (a) Except as otherwise provided in this section and
21 in Section 16064, the trustee shall account at least annually, at the
22 termination of the trust, and upon a change of trustee, to each
23 beneficiary to whom income or principal is required or authorized
24 in the trustee’s discretion to be currently distributed.

25 (b) A trustee of a living trust created by an instrument executed
26 before July 1, 1987, is not subject to the duty to account provided
27 by subdivision (a).

28 (c) A trustee of a trust created by a will executed before July 1,
29 1987, is not subject to the duty to account provided by subdivision
30 (a), except that if the trust is removed from continuing court
31 jurisdiction pursuant to Article 2 (commencing with Section 17350)
32 of Chapter 4 of Part 5, the duty to account provided by subdivision
33 (a) applies to the trustee.

34 (d) Except as provided in Section 16064, the duty of a trustee
35 to account pursuant to former Section 1120.1a of the Probate Code
36 (as repealed by Chapter 820 of the Statutes of 1986), under a trust
37 created by a will executed before July 1, 1977, which has been
38 removed from continuing court jurisdiction pursuant to former
39 Section 1120.1a, continues to apply after July 1, 1987. The duty
40 to account under former Section 1120.1a may be satisfied by

1 furnishing an account that satisfies the requirements of Section
2 16063.

3 (e) Any limitation or waiver in a trust instrument of the
4 obligation to account is against public policy and shall be void as
5 to any sole trustee who is ~~a disqualified person as defined in~~
6 ~~Section 21350.5~~ *described in subdivision (a) of Section 21380 and*
7 *is not described in Section 21382.*

8 SEC. 11. Section 21310 of the Probate Code is amended to
9 read:

10 21310. As used in this part:

11 (a) “Contest” means a pleading filed with the court by a
12 beneficiary that would result in a penalty under a no contest clause,
13 if the no contest clause is enforced.

14 (b) “Direct contest” means a contest that alleges the invalidity
15 of a protected instrument or one or more of its terms, based on one
16 or more of the following grounds:

17 (1) Forgery.

18 (2) Lack of due execution.

19 (3) Lack of capacity.

20 (4) Menace, duress, fraud, or undue influence.

21 (5) Revocation of a will pursuant to Section 6120, revocation
22 of a trust pursuant to Section 15401, or revocation of an instrument
23 other than a will or trust pursuant to the procedure for revocation
24 that is provided by statute or by the instrument.

25 (6) ~~Disqualification of a beneficiary under Section 6112 or~~
26 ~~21350~~ *21380.*

27 (c) “No contest clause” means a provision in an otherwise valid
28 instrument that, if enforced, would penalize a beneficiary for filing
29 a pleading in any court.

30 (d) “Pleading” means a petition, complaint, cross-complaint,
31 objection, answer, response, or claim.

32 (e) “Protected instrument” means all of the following
33 instruments:

34 (1) The instrument that contains the no contest clause.

35 (2) An instrument that is in existence on the date that the
36 instrument containing the no contest clause is executed and is
37 expressly identified in the no contest clause, either individually or
38 as part of an identifiable class of instruments, as being governed
39 by the no contest clause.

1 SEC. 12. Part 3.5 (commencing with Section 21350) of
2 Division 11 of the Probate Code is repealed.

3 SEC. 13. Part 3.5 (commencing with Section 21360) is added
4 to Division 11 of the Probate Code, to read:

5
6 PART 3.5. PRESUMPTION OF FRAUD OR UNDUE
7 INFLUENCE

8
9 CHAPTER 1. DEFINITIONS

10
11 21360. The definitions in this chapter govern the construction
12 of this part.

13 21362. (a) “Care custodian” means a person who provides
14 health or social services to a dependent adult for remuneration, as
15 a profession or occupation. The remuneration need not be paid by
16 the dependent adult.

17 (b) For the purposes of this section, “health and social services”
18 include, but are not limited to, the administration of medicine,
19 medical testing, wound care, assistance with hygiene,
20 companionship, housekeeping, shopping, cooking, and assistance
21 with finances.

22 21364. “Cohabitant” has the meaning provided in Section
23 13700 of the Penal Code.

24 21366. “Dependent adult” means a person who, at the time of
25 executing the instrument at issue under this part, was 18 years of
26 age or older and satisfied one or both of the following conditions:

27 (a) The person was unable to provide properly for the person’s
28 personal needs for physical health, food, clothing, or shelter.

29 (b) The person was substantially unable to manage the person’s
30 own financial resources or resist fraud or undue influence.
31 Substantial inability may not be proved solely by isolated incidents
32 of negligence or improvidence.

33 21368. “Domestic partner” has the meaning provided in Section
34 297 of the Family Code.

35 21370. “Independent attorney” means an attorney who has no
36 legal, business, financial, professional, or personal relationship
37 with the beneficiary of a donative transfer at issue under this part.

38 21372. (a) “Interested witness” means a subscribing witness
39 to a will executed under Section 6110, who is also a devisee of the
40 will.

1 (b) Notwithstanding subdivision (a), a person is not an
2 “interested witness” if there are at least two subscribing witnesses
3 who are not devisees of the will.

4 21374. (a) A person who is “related by blood or affinity” to
5 a specified person means any of the following persons:

6 (1) A spouse or domestic partner of the specified person.

7 (2) A relative within a specified degree of kinship to the
8 specified person or within a specified degree of kinship to the
9 spouse or domestic partner of the specified person.

10 (3) The spouse or domestic partner of a person described in
11 paragraph (2).

12 (b) For the purposes of this section, “spouse or domestic partner”
13 includes a predeceased spouse or predeceased domestic partner.

14 (c) In determining a relationship under this section, Sections
15 6406 and 6407, and Chapter 2 (commencing with Section 6450)
16 of Part 2 of Division 6, are applicable.

17
18 CHAPTER 2. OPERATION AND EFFECT OF PRESUMPTION

19
20 21380. (a) A provision of an instrument making a donative
21 transfer to any of the following persons is presumed to be the
22 product of fraud or undue influence:

23 (1) The person who drafted the instrument.

24 (2) A person in a fiduciary relationship with the transferor who
25 transcribed the instrument or caused it to be transcribed.

26 (3) A care custodian of a transferor who is a dependent adult,
27 but only if the instrument was executed during the period in which
28 the care custodian provided services to the transferor.

29 (4) An interested witness.

30 (5) A person who is related by blood or affinity, within the third
31 degree, to any person described in paragraphs (1) to (4), inclusive.

32 (6) A cohabitant or employee of any person described in
33 paragraphs (1) to (4), inclusive.

34 (7) A partner, shareholder, or employee of a law firm in which
35 a person described in paragraph (1) or (2) has an ownership interest.

36 (b) The presumption created by this section is a presumption
37 affecting the burden of proof. The presumption may be rebutted
38 by proving, by a preponderance of the evidence, that the donative
39 transfer was not the product of fraud or undue influence.

1 (c) If a beneficiary is unsuccessful in rebutting the presumption,
2 the beneficiary shall bear all costs of the proceeding, including
3 reasonable attorney’s fees.

4 21382. Section 21380 does not apply to any of the following
5 instruments or transfers:

6 (a) A donative transfer to a person who is related by blood or
7 affinity, within the fifth degree, to the transferor or is the cohabitant
8 of the transferor.

9 (b) An instrument that is drafted or transcribed by a person who
10 is related by blood or affinity, within the fifth degree, to the
11 transferor or is the cohabitant of the transferor.

12 (c) An instrument that is approved pursuant to an order under
13 Article 10 (commencing with Section 2580) of Chapter 6 of Part
14 4 of Division 4, after full disclosure of the relationships of the
15 persons involved.

16 (d) A donative transfer to a federal, state, or local public entity,
17 an entity that qualifies for an exemption from taxation under
18 Section 501(c)(3) or 501(c)(19) of the Internal Revenue Code, or
19 a trust holding the transferred property for the entity.

20 (e) A donative transfer of property valued at five thousand
21 dollars (\$5,000) or less, if the total value of the transferor’s estate
22 equals or exceeds the amount stated in Section 13100.

23 (f) An instrument executed outside of California by a transferor
24 who was not a resident of California when the instrument was
25 executed.

26 21384. (a) A gift is not subject to Section 21380 if the
27 instrument is reviewed by an independent attorney who counsels
28 the transferor about the nature and consequences of the intended
29 transfer, attempts to determine if the intended transfer is the result
30 of fraud or undue influence, and signs and delivers to the transferor
31 an original certificate in substantially the following form:

32
33 “CERTIFICATE OF INDEPENDENT REVIEW

34 I, _____, have reviewed
35 (attorney’s name)

36 _____ and have counseled the transferor,
37 (name of instrument)

38 _____, on the nature and consequences of any
39 (name of transferor)

40 transfers of property to _____

1 (name of person described in Section 21380 of the Probate Code)
2 that would be made by the instrument.

3 I am an “independent attorney” as defined in Section 21370 of the Probate
4 Code and am in a position to advise the transferor independently, impartially,
5 and confidentially as to the consequences of the transfer.

6 On the basis of this counsel, I conclude that the transfers to
7 _____ that would
8 (name of person described in Section 21380 of the Probate Code)
9 be made by the instrument are not the product of fraud or undue influence.

10
11 _____”
12 (Name of Attorney) (Date)
13

14 (b) An attorney whose written engagement, signed by the
15 transferor, is expressly limited solely to compliance with the
16 requirements of this section, shall not be considered to otherwise
17 represent the transferor as a client.

18 (c) An attorney who drafts an instrument can review and certify
19 the same instrument pursuant to this section, but only as to a gift
20 to a care custodian. In all other circumstances, an attorney who
21 drafts an instrument may not review and certify the instrument.

22 (d) If the certificate is prepared by an attorney other than the
23 attorney who drafted the instrument that is under review, a copy
24 of the signed certification shall be provided to the drafting attorney.

25 21386. If a gift fails under this part, the instrument making the
26 gift shall operate as if the beneficiary had predeceased the
27 transferor without spouse, domestic partner, or issue.

28 21388. (a) A person is not liable for transferring property
29 pursuant to an instrument that is subject to the presumption created
30 under this part, unless the person is served with notice, prior to
31 transferring the property, that the instrument has been contested
32 under this part.

33 (b) A person who is served with notice that an instrument has
34 been contested under this part is not liable for failing to transfer
35 property pursuant to the instrument, unless the person is served
36 with notice that the validity of the transfer has been conclusively
37 determined by a court.

38 21390. This part applies notwithstanding a contrary provision
39 in an instrument.

1 21392. (a) This part shall apply to instruments that become
2 irrevocable on or after September 1, 1993. For the purposes of this
3 section, an instrument that is otherwise revocable or amendable
4 shall be deemed to be irrevocable if on September 1, 1993, the
5 transferor by reason of incapacity was unable to change the
6 disposition of the transferor's property and did not regain capacity
7 before the date of the transferor's death.

8 (b) Nothing in this part precludes an action to contest a donative
9 transfer under other applicable law.