

First Supplement to Memorandum 2010-31

2010 Legislative Program: Status of SB 105 (Harman)

Memorandum 2010-31 describes recent amendments to Senate Bill 105 (Harman), which would implement the Commission's recommendation on *Donative Transfer Restrictions*, 38 Cal. L. Revision Comm'n Reports 107 (2008). It also sets out revised Commission Comments for the sections of the bill that were amended.

This supplement describes amendments that arose after the preparation of Memorandum 2010-31, along with Comment revisions required to conform to those amendments. **The Commission needs to decide whether to ratify the recent amendments and approve a Comment revision, for incorporation into the report attached to Memorandum 2010-31.**

Retroactivity Concerns

Senator Harman received comment from an estate planning attorney who expressed strong concern about the retroactive application of the proposed law. The attorney is representing a client who would be severely prejudiced by the retroactive application of changes made in SB 105. The situation is as follows:

- Under existing law, there is a presumption of invalidity when a gift is made to the drafter of a donative instrument, or to the drafter's close family and business associates. That presumption is conclusive with respect to the drafter, but not with respect to the drafter's family and associates. In other words, the drafter's family and associates are subject to the presumption, but can attempt to rebut it.
- Under SB 105, as recently amended, the presumption that applies to a drafter's family and associates would be conclusive. With that change in the law, family and associates of a drafter would *not* be able to rebut the presumption.
- The commenter is representing a person, in a pending case, who is a beneficiary of an instrument drafted by a family member. If SB

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.

105 does *not* apply retroactively, the family member can attempt to rebut the presumption (as is the case under existing law). If the bill is applied retroactively, the family member cannot rebut and the gift will be invalidated.

The commenter objects that such a significant retroactive change in the law would be unfair, especially because the transferor is already deceased and can no longer make changes to the donative instrument to adjust to the new law.

In response to this objection, Senator Harman decided to amend the bill so that the new law would only apply to gifts that become irrevocable on or after January 1, 2011 (the operative date of the new law). Instruments that became irrevocable before January 1, 2011 would continue to be governed by the former law.

In order to avoid the burden of applying law that is no longer “on the books,” the amendment was crafted to preserve both former law and the new law, side-by-side. The former law will include a “sunset provision” to repeal that law on January 1, 2014. In other words, both bodies of law will be in the Probate Code, with provisions stating their non-overlapping application, for three years. Then the old statute will be repealed, leaving only the new statute in the Probate Code.

Ratification

The staff recommends that the Commission ratify the amendment making the proposed law prospective only.

That amendment would make the Comment to proposed Section 21392 incorrect. **The staff therefore recommends that the Comment be revised to correct the inconsistency between the amended bill and the Comment language, thus:**

§ 21392. Application of part

Comment. ~~Subdivision (a) of Section 21392 continues former Section 21355 without substantive change~~ limits the application of this part to instruments that become irrevocable on or after January 1, 2011. Instruments that became irrevocable before that date are governed by the former law. See Sections 3(g), 21355.

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Respectfully submitted,

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Executive Secretary