

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Donative Transfer Restrictions

June 2008

The purpose of this tentative recommendation is to solicit public comment on the Commission's tentative conclusions. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **August 8, 2008**. The Commission will still accept comments after that date and consider them to the extent possible. However, the Commission expects to approve a final recommendation on December 11, 2008. Comments must be received before then to have any impact on the Commission's recommendation.

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SUMMARY OF TENTATIVE RECOMMENDATION

The Law Revision Commission is conducting a comprehensive review of Probate Code Sections 21350 to 21356, which establish a presumption of menace, duress, fraud, or undue influence when a gift is made to a “disqualified person.”

The Commission invites public comment on this tentative recommendation, which proposes that the existing statute be repealed and restated to make the following substantive changes:

- (1) Limit the statutory presumption to cover only fraud and undue influence (eliminating any presumption of menace or duress).
- (2) Limit the definition of “care custodian” to a person who provides health or social services for remuneration, as a profession or occupation.
- (3) Limit the definition of “dependent adult” to a person who would be eligible for the appointment of a conservator.
- (4) Harmonize the statutory presumption with the similar presumption that arises under Probate Code Section 6112.
- (5) Eliminate special evidentiary restrictions on rebutting the statutory presumption.
- (6) 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.
- (7) Eliminate the special statute of limitations for actions under the statute.

The proposed legislation would also correct a number of technical problems in the existing statute.

This tentative recommendation was prepared pursuant to Chapter 215 of the Statutes of 2006.

DONATIVE TRANSFER RESTRICTIONS

BACKGROUND

1
2 In 1993, it was reported that a California estate planning attorney was exploiting
3 his elderly clients by drafting estate plans for them that included large gifts to
4 himself, his family, and his colleagues.¹ In response to those reported abuses, the
5 Legislature enacted Probate Code Section 21350 *et seq*, which establish a statutory
6 presumption of menace, duress, fraud, or undue influence when a donative
7 instrument makes a gift to the person who drafted or transcribed the instrument.²
8 The statutory presumption acts as a supplement to the common law on menace,
9 duress, fraud, and undue influence.³ A gift that does not fall within the scope of
10 the statutory presumption can still be challenged under the common law.

11 The statutory presumption was expanded in 1997,⁴ so that it also applies to a gift
12 made by a “dependent adult”⁵ to that person’s “care custodian.”⁶ That change was
13 proposed by the Trusts and Estates Section of the State Bar, to address concern
14 that “practical nurses” were taking financial advantage of “dementing seniors.”⁷

15 The application of the statutory presumption to a care custodian has been
16 criticized as overbroad.⁸ In 2006, the Chief Justice of the California Supreme
17 Court raised a similar concern and suggested that the Legislature review the
18 application of the statute to a care custodian.⁹ Later that year, a statute was enacted
19 directing the California Law Revision Commission to conduct a comprehensive
20 study of the operation of the statutory presumption.¹⁰

1. See, e.g., D. Maharaj, *Assembly OKs Bill to Ban Client Bequests to Lawyers*, Los Angeles Times (July 17, 1993).

2. 1993 Cal. Stat. ch. 293.

3. 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, 97, 47 P.3d 300, 120 Cal. Rptr. 2d 522 (2002).

4. 1997 Cal. Stat. ch. 724.

5. See Prob. Code § 21350(c) (incorporating definition of “dependent adult” from Welf. & Inst. Code § 15610.23, except that any person over age 17 can be dependent adult).

6. See Prob. Code § 21350(c) (incorporating definition of “care custodian” from Welf. & Inst. Code § 15610.17).

7. See Letter from Don Green and Marc B. Hankin to David Long, State Bar of California Director of Research (Oct. 16, 1996) (on file with Commission).

8. See, e.g., Letter from Sam Crump to Jody Remke, California Judges Association (June 26, 1997) (on file with Commission); K. Kwasneski, *The Danger of a Label: How the Legal Interpretation of “Care Custodian” Can Frustrate a Testator’s Wish to Make a Gift to a Personal Friend*, 36 Golden Gate U. L. Rev. 269, 284-88 (2006).

9. *Bernard v. Foley*, 39 Cal. 4th at 816 (George, C.J., concurring).

10. 2006 Cal. Stat. ch. 215 (AB 2034 (Spitzer)).

1 This tentative recommendation reports the Commission’s findings and includes
2 proposed legislation to remedy problems that exist in the current statute. The
3 Commission invites public comment on the proposed legislation.

4 OVERVIEW OF THE EXISTING STATUTE

5 **Presumption of Menace, Duress, Fraud, or Undue Influence**

6 A gift to a “disqualified person” is presumed to be invalid, as the product of
7 menace, duress, fraud or undue influence.¹¹ Clear and convincing evidence is
8 required to rebut the presumption.¹² The rebuttal evidence must include evidence
9 other than the testimony of a disqualified person.¹³ A disqualified person who
10 unsuccessfully attempts to rebut the presumption bears all of the costs of the
11 proceeding, including reasonable attorney’s fees.¹⁴

12 **Disqualified Persons**

13 There are four classes of “disqualified persons”:

- 14 (1) The drafter of a donative instrument.¹⁵
- 15 (2) A fiduciary of the transferor who transcribes a donative instrument or causes
16 it to be transcribed.¹⁶
- 17 (3) A care custodian of a dependent adult.¹⁷
- 18 (4) A close relative, cohabitant, or specified business associate of a person in
19 one of the first three classes.¹⁸

20 Unless an exception applies, a gift to any of these disqualified persons is
21 presumed to be the product of menace, duress, fraud, or undue influence.

22 **Statutory Exceptions**

23 There are six categorical exceptions to the operation of the statutory
24 presumption. The presumption does not apply in any of the following
25 circumstances:

- 26 (1) The disqualified person is a close relative or cohabitant of the transferor.¹⁹

11. Prob. Code §§ 21350(a), 21350.5, 21351(d).

12. *Id.*

13. *Id.*

14. *Id.*

15. Prob. Code §§ 21350(a)(1), 21350.5.

16. Prob. Code §§ 21350(a)(4), 21350.5.

17. Prob. Code §§ 21350(a)(6), 21350.5.

18. Prob. Code §§ 21350(a)(2)-(3), (5), (7), 21350.5.

19. Prob. Code § 21351(a), (g).

- 1 (2) The donative instrument was drafted by a close relative or cohabitant of the
2 transferor.²⁰
- 3 (3) The donative instrument is executed by a conservator on behalf of a
4 conservatee and is approved by the court under the procedures for
5 substituted judgment.²¹
- 6 (4) The beneficiary is a public entity or tax-exempt nonprofit entity.²²
- 7 (5) The gift is valued at \$3,000 or less, if the estate is valued at \$100,000 or
8 more.²³
- 9 (6) The donative instrument is executed outside of California by a transferor
10 who is not a resident of California at the time of execution.²⁴

11 **Independent Attorney Certification**

12 In addition to the categorical exceptions, there is a validating procedure that can
13 be used to avoid the statutory presumption of menace, duress, fraud, or undue
14 influence. The statutory presumption does not apply if a gift is reviewed by an
15 independent attorney who counsels the transferor about the nature and
16 consequences of the gift and certifies that the gift is not the product of menace,
17 duress, fraud, or undue influence.²⁵

18 **Effect of Failed Transfer**

19 If a gift fails as a result of the statutory presumption, the donative instrument
20 operates as if the disqualified person had predeceased the transferor, without
21 spouse or issue, but only to the extent that the value of the gift exceeds what the
22 disqualified person would have received if the transferor had died intestate.²⁶

23 **Commencement of Action**

24 The time to commence an action to challenge a gift under Section 21350
25 depends on the nature of the donative instrument at issue. In the case of a will, the
26 action must be commenced before an order for final distribution is made.²⁷ For any
27 other donative instrument, the action must be commenced within the later of three
28 years after the instrument becomes irrevocable or three years after the contestant

20. *Id.*

21. Prob. Code § 21351(c).

22. Prob. Code § 21351(f).

23. Prob. Code § 21351(h).

24. Prob. Code § 21351(i).

25. Prob. Code § 21351(b).

26. Prob. Code § 21353.

27. Prob. Code § 21356.

1 discovers, or reasonably should have discovered, the facts material to the
2 transfer.²⁸

3 ANALYSIS AND RECOMMENDATIONS

4 **General Policy**

5 The general policy of the existing statute is to identify classes of gifts that
6 present a heightened risk of menace, duress, fraud, or undue influence, and to
7 establish a rebuttable presumption of invalidity for those gifts.

8 The Commission finds no reason to question that general approach. It is
9 consistent with the approach taken under the common law on undue influence,
10 which includes a presumption of undue influence when certain factual indicia of
11 undue influence are established.²⁹ The factual grounds for the common law
12 presumption differ from the grounds for the statutory presumption, but the general
13 principle is the same.

14 The statutory presumption established by Probate Code Section 21350 is also
15 consistent with another existing statutory presumption that arises when a will
16 makes a devise to a necessary witness of the will.³⁰ In both cases, the Legislature
17 has determined that certain facts surrounding the creation of a donative instrument
18 create a significant enough risk of undue influence as to justify imposing a
19 rebuttable presumption.

20 Probate Code Section 21350 supplements the common law; it does not preempt
21 it.³¹ That is appropriate. There will be many circumstances that do not fall within
22 the scope of the statutory presumption but that nonetheless involve the use of
23 menace, duress, fraud, or undue influence to procure a gift. Such gifts can be
24 contested under established common law principles.

25 Although the general policy served by the existing statute is sound, there are a
26 number of specific problems that should be addressed. Those problems, and the
27 reforms proposed by the Commission to address them, are discussed in detail
28 below.

28. *Id.*

29. The facts establishing the common law presumption of undue influence are: (1) the existence of a confidential relationship between the transferor and the beneficiary, (2) the participation of the beneficiary in the creation of the will, and (3) an undue profit to the beneficiary. See *Rice v. Clark*, 28 Cal. 4th 89, 97, 47 P.3d 300, 120 Cal. Rptr. 2d 522 (2002).

30. See Prob. Code § 6112.

31. 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, 97, 47 P.3d 300, 120 Cal. Rptr. 2d 522 (2002).

1 **Menace and Duress**

2 Under the existing statute, a gift to a disqualified person is presumed to be the
3 product of menace, duress, fraud, or undue influence.³² If the presumption is not
4 rebutted by the disqualified person, the gift fails.³³

5 That approach is reasonable with respect to the presumption of fraud and undue
6 influence. The circumstances governed by the statutory presumption bear many of
7 the common law indicia of fraud and undue influence, including a confidential
8 relationship between the transferor and beneficiary, beneficiary participation in the
9 creation of the gift, undue profit, an opportunity for the beneficiary to exert undue
10 influence, and vulnerability of the transferor to undue influence.³⁴

11 This is not true for menace and duress. Menace and duress are terms of art that
12 describe extreme forms of coercion, often rising to the level of criminal
13 misconduct.³⁵

14 The Commission does not believe that the statutory presumption should
15 encompass menace and duress. The fact that a beneficiary of a gift drafted or
16 transcribed the donative instrument, or served as the care custodian of the
17 transferor, does not justify a presumption that the gift was procured through the
18 extreme forms of misconduct that constitute menace and duress. Such
19 beneficiaries should not be required to prove the absence of menace and duress in
20 order to receive a gift.

21 The proposed law would not continue the presumption of menace and duress.³⁶

22 **Drafter or Transcriber of Donative Instrument as Disqualified Person**

23 Under existing law, the class of “disqualified persons” includes a person who
24 receives a gift and either (1) drafts the donative instrument that makes the gift or

32. Prob. Code § 21351(d).

33. Prob. Code § 21353.

34. For a general discussion of the evidentiary indicia of undue influence, see 64 Cal. Jur. 3d *Wills* §§ 173-221 (2007).

35. Civ. Code § 1561 provides:

Duress consists in:

1. Unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband, or wife;
2. Unlawful detention of the property of any such person; or,
3. Confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harrasing [sic] or oppressive.

Civ. Code § 1562 provides:

Menace consists in a threat:

1. Of such duress as is specified in Subdivisions 1 and 3 of the last section;
2. Of unlawful and violent injury to the person or property of any such person as is specified in the last section; or,
3. Of injury to the character of any such person.

36. See proposed Prob. Code § 21380 (presumption of fraud or undue influence) *infra*.

1 (2) is a fiduciary of the transferor and transcribes the donative instrument (or
2 causes it to be transcribed).³⁷

3 The Commission finds no reason to question that approach. It is consistent with
4 the common law presumption of undue influence that arises when a beneficiary is
5 in a confidential relationship with a transferor, participates in the creation of the
6 gift, and receives an undue profit.³⁸ A drafter or fiduciary transcriber of a donative
7 instrument is typically in a confidential relationship with the transferor, directly
8 participates in the creation of the gift, and will often appear to receive undue
9 profit.³⁹

10 Care Custodian as Disqualified Person

11 *Existing Law*

12 The existing definition of “care custodian” is very broad. It encompasses any
13 “person providing health services or social services.”⁴⁰ Such services can include
14 the administration of medicine, cleaning and bandaging injuries, bathing, assisting
15 with the toilet, shopping, cooking, housekeeping, driving, and assisting with
16 finances.⁴¹

17 Two subsequently overruled appellate decisions had held that the definition of
18 “care custodian” was limited to a person who provides services as a profession or
19 occupation, and not as the result of a preexisting personal relationship.⁴²

20 This interpretation of the term “care custodian” as used in section 21350
21 achieves the prophylactic purpose of the statute by protecting dependent adults
22 from the predatory practices of individuals who misuse their professional
23 positions to obtain personal favors, without doing violence to those authentic
24 personal relationships in which care giving is the natural outgrowth of long-
25 standing friendship, affection and genuine charity.⁴³

37. Prob. Code § 21350(a)(1) & (4).

38. See *Rice v. Clark*, 28 Cal. 4th 89, 97, 47 P.3d 300, 120 Cal. Rptr. 2d 522 (2002).

39. Because the statutory presumption does not apply to close relatives of the transferor (Prob. Code § 21351(a)), it is more likely than usual that a gift to a disqualified person would be characterized as unnatural and would therefore be considered “undue profit.” See *Estate of Sarabia*, 221 Cal. App. 3d 599, 607, 270 Cal. Rptr. 560 (1990) (in determining whether a gift constitutes undue profit, the court must consider “the respective relative standings of the beneficiary and the contestant to the decedent in order [to] determine which party would be the more obvious object of the decedent’s testamentary disposition.”). Any gift to the transferor’s attorney is deemed to constitute undue profit. See *Estate of Auen*, 30 Cal. App. 4th 300, 310, 35 Cal. Rptr. 2d 557 (1994) (“Transactions between attorneys and their clients are subject to the strictest scrutiny.”).

40. See *Bernard v. Foley*, 39 Cal. 4th 794, 807, 139 P.3d 1196, 47 Cal. Rptr. 3d 248 (2006) (interpreting Welf. & Inst. Code § 15610.17).

41. *Id.* at 805-06.

42. See *Conservatorship of Davidson*, 113 Cal. App. 4th 1035, 6 Cal. Rptr. 3d 702 (2004); *Conservatorship of McDowell*, 125 Cal. App. 4th 659, 23 Cal. Rptr. 3d 10 (2004).

43. *Davidson*, 113 Cal. App. 4th at 1053.

1 That interpretation of “care custodian” was directly overruled by the California
2 Supreme Court, which held that there is no exception for a person who provides
3 services out of friendship or charity.⁴⁴ The Court’s holding was based mainly on
4 statutory interpretation and legislative history:

5 In short, neither the statutory language nor the legislative history supports a
6 preexisting personal friendship exception to section 21350’s presumptive
7 disqualification of care custodian donees. It is not for us to gainsay the wisdom of
8 this legislative choice. In the event, however, we have mistaken the Legislature’s
9 intention, that body may readily correct our error.⁴⁵

10 In a concurring opinion, Chief Justice George took the unusual step of
11 suggesting that the Legislature revisit the care custodian provision:

12 [Notwithstanding] our customary and proper reticence in encouraging
13 legislative action, in the present context I believe the Legislature would do well to
14 consider modifying or augmenting the relevant provisions in order to more fully
15 protect the interests of dependent adults and society as a whole, by according
16 separate treatment to longer term care custodians who undertake that role as a
17 consequence of a personal relationship rather than as an occupational
18 assignment.⁴⁶

19 In a dissenting opinion, three justices argued that the statutory presumption does
20 not and should not apply to a person who provides care services as a friend or
21 volunteer, rather than as a profession or occupation:⁴⁷

22 While it is certainly true that nonprofessionals may take advantage of the
23 infirm, it is also true that the kind and generous may act graciously to ease the
24 suffering of those in need. The motives at play in any given case is the kind of
25 factual question the trial court exists to resolve. Absent a clear legislative
26 pronouncement to the contrary, we should allow the court to do so without an
27 artificially imposed presumption.⁴⁸

28 ***Policy Rationales for Care Custodian Presumption***

29 There are three sound policy rationales for presuming fraud or undue influence
30 when a gift is made to the care custodian of a dependent transferor:

31 (1) *Opportunity to exert undue influence.* The opportunity to exert undue
32 influence on a transferor is one of the common law indicia of undue
33 influence.⁴⁹ The intimacy, privacy, and duration of a care custodian

44. Bernard v. Foley, 39 Cal. 4th at 807.

45. *Id.* at 813.

46. *Id.* at 816 (George, C.J., concurring).

47. *Id.* at 821-24 (Corrigan, J., dissenting).

48. *Id.* at 824.

49. See 64 Cal. Jur. 3d *Wills* § 187 (2007).

1 relationship provides a significant opportunity to exert undue influence on a
2 dependent adult.

3 (2) *Special vulnerability to undue influence.* Undue influence is influence that
4 “overcomes the will without convincing the judgment.”⁵⁰ Any demonstrated
5 vulnerability of a transferor to such influence can be offered as evidence of
6 undue influence.⁵¹ Because a transferor may be dependent on a care
7 custodian for assistance with the necessities of life, often including
8 assistance with personal matters, the transferor may be unusually vulnerable
9 to influence from the care custodian. Furthermore, the dependency
10 relationship may result from physical or cognitive impairments (e.g.,
11 incipient dementia, chronic pain, depression) that could make the transferor
12 more vulnerable to pressure and manipulation.

13 (3) *Unnatural gift.* The claim that a gift is “unnatural” is also a recognized
14 indicia of undue influence.⁵² An estate plan may be considered unnatural if
15 it provides a large gift to a person who is not related to the transferor or is
16 remotely related, while providing a less generous gift to close relations (the
17 “natural objects” of the transferor’s bounty). Because Probate Code Section
18 21351 exempts close family members and small gifts, the statutory
19 presumption will only operate when a relatively large gift is made to a non-
20 relative (or remote relative). Under those facts, the gift to the care custodian
21 may appear “unnatural.”

22 *Analysis and Recommendation*

23 The first two rationales for the care custodian presumption, the opportunity to
24 exert undue influence and the vulnerability of the transferor to influence, apply
25 equally to both occupational and non-occupational caregivers. In either case, the
26 caregiver will have the same extended opportunity to exert influence over the
27 transferor and the transferor is just as likely to be vulnerable to influence.

28 The third rationale, the apparent unnaturalness of a large gift to a care custodian,
29 does not apply with equal force to occupational and non-occupational caregivers.
30 While a large gift to a paid employee may appear “unnatural,” the same gift to a
31 friend or Good Samaritan may not. It seems likely that a person who is receiving
32 essential personal assistance from a friend, neighbor, or other volunteer would feel
33 genuine gratitude and affection toward that person.

34 If the law presumes that a gift to a friend or other volunteer care custodian is the
35 product of fraud or undue influence, the intentions of the transferor may be
36 thwarted. An intended gift may fail merely because the beneficiary lacks the
37 resources or evidence to rebut the presumption.

50. *In re Anderson’s Estate*, 185 Cal. 700, 707, 198 P. 407 (1921).

51. See 64 Cal. Jur. 3d *Wills* § 188 (2007).

52. See, e.g., *In re Finkler’s Estate*, 3 Cal. 2d 584, 46 P.2d 149 (1935) (will named husband of niece of transferor’s predeceased spouse as heir, omitted half-sister). See also 64 Cal. Jur. 3d *Wills* § 158 (2007).

1 The proposed law would limit the definition of “care custodian” to a person who
2 provides services for remuneration, as a profession or occupation.⁵³ A person who
3 provides care services as a volunteer would not be a “care custodian” and a gift to
4 such a person would not be presumed to be the product of fraud or undue
5 influence.

6 The proposed law would also make clear that the presumption of fraud or undue
7 influence applies only to a donative instrument that is executed during the period
8 in which the care custodian is providing services.⁵⁴ An instrument executed before
9 the commencement of care services or after the termination of care services is
10 unlikely to have been the product of fraud or undue influence exerted through the
11 care custodian relationship.

12 **Dependent Adult**

13 The care custodian provision only applies if the transferor is a dependent adult.⁵⁵
14 So, for example, a gift to a transferor’s physician or housekeeper would not be
15 presumed to be the product of fraud or undue influence unless the transferor is a
16 dependent adult.

17 The requirement that a transferor be a dependent adult appears to be grounded in
18 an assumption that a person in a condition of dependency will be more vulnerable
19 to fraud and undue influence than a person who is independent.

20 The fact of dependency alone might contribute to that vulnerability. A transferor
21 who is dependent on another may be socially isolated and more susceptible to
22 threats or other pressure from the person on whom the transferor relies for
23 essential care.

24 The risk of undue influence may also be heightened by the physical or mental
25 condition of a dependent adult. A transferor with dementia, chronic pain, fatigue,
26 or other disabling conditions may have a lowered resistance to pressure. That may
27 explain why, under existing law, the definition of “dependent adult” requires that
28 the transferor be disabled.⁵⁶

29 The Commission believes that the existing definition of “dependent adult” is
30 overbroad for the purposes of the statutory presumption of fraud or undue
31 influence. It includes all disabled persons who require assistance, without any
32 individualized determination of whether the person’s disability is so severe as to
33 create a special vulnerability to fraud or undue influence. This impairs the

53. See proposed Prob. Code § 21362 *infra*.

54. See proposed Prob. Code § 21380(a)(3) *infra*.

55. Prob. Code § 21350(a)(6).

56. “Dependent adult” is defined as an adult “who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.” See Welf. & Inst. Code § 15610.23; Prob. Code §21350(c).

1 testamentary freedom of disabled persons as a class, in order to protect those who
2 are vulnerable to abuse.

3 The Commission recommends a different approach. Rather than presume the
4 invalidity of any gift made by a disabled person to a care custodian, the proposed
5 law would instead define “dependent adult” as an adult for whom a conservator
6 could have been appointed, if a petition for conservatorship had been filed at the
7 time that the donative instrument was executed.⁵⁷

8 That standard would require an individualized assessment of whether the
9 transferor was capable of living independently, or was so disabled as to require the
10 protection of a conservator. This would protect those who are determined to have
11 been in need of protection, without imposing blanket restrictions on the
12 testamentary freedom of those who may need some assistance as a result of a
13 disability, but are generally competent to manage their own affairs.

14 **Interested Witness of Will**

15 Under Probate Code Section 6112, there is a presumption of menace, duress,
16 fraud, or undue influence when a will makes a devise to a necessary witness of the
17 will. This reflects the same general policy effectuated by Probate Code Section
18 21350. However, the two statutes differ significantly in their details.⁵⁸

19 The Law Revision Commission sees no policy reason to treat a gift to an
20 interested witness of a will differently from other gifts that are presumed, by
21 statute, to be the product of menace, duress, fraud, or undue influence.

22 The proposed law would harmonize the treatment of all such gifts by including
23 an interested witness within the scope of the general statutory presumption and
24 eliminating the special treatment afforded by Section 6112.⁵⁹

25 **Derivative Disqualification**

26 Under existing law, the spouse, domestic partner, close relative, cohabitant, or
27 business associate of a disqualified person is also treated as a disqualified person.⁶⁰
28 For example, if an attorney drafts a will that makes a gift to the attorney’s spouse,
29 that gift is also subject to the statutory presumption of menace, duress, fraud, or
30 undue influence.

31 The proposed law would continue most of the substance of the existing rules on
32 derivative disqualification, with the following improvements:

57. See proposed Prob. Code § 21366 *infra*.

58. *E.g.*, compare Prob. Code § 6112(c) (presumption rebutted by preponderance of evidence) with Prob. Code § 21351(d) (presumption rebutted by clear and convincing evidence).

59. See proposed Prob. Code §§ 21372, 21380(a)(4) *infra*.

60. Prob. Code §§ 21350(a)(2)-(3), (5), (7), 21350.5.

- 1 • The rule that disqualifies certain persons affiliated with the law firm of the
2 drafting attorney would be generalized to apply equally to the law firm of a
3 fiduciary transcriber.⁶¹
- 4 • The existing reference to a “law partnership or law corporation” would be
5 replaced with a reference to a “law firm,” so as not to exclude a limited
6 liability company, sole proprietorship, or any other type of business entity.⁶²
- 7 • The definition of “related by blood and marriage” would be revised to fully
8 harmonize the treatment of spouses and domestic partners.⁶³
- 9 • The same definition of “cohabitant” would be used for (1) the exemption for
10 a gift to the transferor’s cohabitant⁶⁴ and (2) the derivative disqualification
11 of a cohabitant of a disqualified person.⁶⁵

12 **Categorical Exceptions**

13 Existing law exempts certain beneficiaries and instruments from the operation of
14 the statutory presumption.⁶⁶

15 The proposed law would continue those exceptions, with three minor
16 substantive changes:

- 17 (1) The definition of “related by blood or marriage” that governs the derivative
18 disqualification of relatives would be generalized to apply equally to the
19 exemptions that involve relatives of the transferor.⁶⁷ The exemption of
20 “heirs” of the transferor would not be continued.
- 21 (2) The exemption for a donative instrument that is drafted by the transferor’s
22 spouse, domestic partner, cohabitant, or relative within the fifth degree of
23 kinship would be extended to also govern an instrument that is transcribed
24 by the transferor’s spouse, domestic partner, cohabitant, or relative.⁶⁸
- 25 (3) The exception for a small gift of \$3,000 or less would be increased to
26 include a gift of \$5,000 or less.⁶⁹

61. Compare Prob. Code § 21350(a)(3) with proposed Prob. Code § 21380(a)(7) *infra*.

62. *Id.*

63. Compare Prob. Code § 21350(b) with proposed Prob. Code § 21374 *infra*.

64. Prob. Code § 21351(a).

65. See proposed Prob. Code § 21364 *infra*.

66. See Prob. Code § 21351(a) (gift to transferor’s spouse, domestic partner, cohabitant, relative within fifth degree; donative instrument drafted by transferor’s spouse, domestic partner, cohabitant, relative within fifth degree), (c) (judicially approved gift executed by conservator on behalf of conservatee), (f) (beneficiary is public or nonprofit entity), (h) (small gift), (i) (donative instrument executed out of state by nonresident).

67. Compare Prob. Code § 21351(g) with proposed Prob. Code § 21374 *infra*.

68. Compare Prob. Code § 21351(a) with proposed Prob. Code § 21382(b) *infra*.

69. Compare Prob. Code § 21351(h) with proposed Prob. Code § 21382(e) *infra*.

1 **Rebuttal of the Presumption**

2 Under existing law, the statutory presumption can only be rebutted by clear and
3 convincing evidence,⁷⁰ which must include some evidence other than the
4 testimony of the beneficiary.⁷¹ Furthermore, the presumption appears to be
5 conclusive as to some drafters of donative instruments.⁷²

6 None of those evidentiary restrictions apply to the common law presumption of
7 undue influence or to the presumption that arises when a will makes a devise to a
8 necessary witness. A preponderance of the evidence is sufficient to rebut those
9 presumptions.⁷³

10 This distinction is counter-intuitive. The prerequisites for the statutory
11 presumption under Section 21350 are easier to establish than the prerequisites for
12 the common law presumption,⁷⁴ yet the statutory presumption is considerably
13 harder to rebut (and in some cases appears to be conclusive).

14 The purpose of the statutory presumption is to protect a transferor from fraud or
15 undue influence in circumstances that suggest such misconduct has occurred. The
16 purpose is not to prohibit gifts to certain persons or interfere with the operation of
17 gifts that are freely and intentionally given. If a beneficiary can prove, by a
18 preponderance of the evidence, that a gift is not the product of fraud or undue
19 influence, the gift should not fail. That is true whether the presumption of fraud or
20 undue influence arises under the common law, under Probate Code Section 6112,
21 or under Probate Code Section 21350.

22 The proposed law would not continue the strict evidentiary requirements for
23 rebuttal of the statutory presumption.⁷⁵ A preponderance of the evidence would be
24 sufficient to rebut the presumption.

25 **Independent Attorney Certification**

26 Under existing law, the statutory presumption can be avoided if an independent
27 attorney reviews the donative instrument, counsels the transferor about the nature
28 and consequences of the transfer, and certifies that the gift is not the product of
29 menace, duress, fraud, or undue influence.⁷⁶

70. See Prob. Code § 21351(d).

71. *Id.*

72. See Prob. Code § 21351(e). The precise meaning of this provision is difficult to determine. It appears, however, that the general intent is to preclude rebuttal of the presumption by a drafter of a donative instrument.

73. See *Sarabia v. Gibbs*, 221 Cal. App. 3d 599, 605, 270 Cal. Rptr. 560 (1990); 64 Cal. Jur. 3d *Wills* § 224 (2007) (common law presumption); Prob. Code § 6112(c) (interested witness).

74. There is no requirement that undue profit be proven to establish the statutory presumption. Nor is there a requirement that a care custodian participate in the creation of the gift in order to be presumptively disqualified. See Prob. Code § 21350(a).

75. Compare Prob. Code § 21351(d)-(e) with proposed Prob. Code § 21380(b) *infra*.

76. Prob. Code § 21351(b).

1 The proposed law would continue the substance of this saving mechanism, with
2 the following exceptions:

- 3 (1) A definition of “independent attorney” would be added to provide a clear
4 standard as to the degree of disassociation required in order to provide an
5 independent attorney certification.⁷⁷ The standard borrows concepts from
6 the Rules of Professional Conduct governing attorney conflicts of interest.⁷⁸
7 This would provide a familiar rule for attorneys who are asked to certify a
8 donative instrument.
- 9 (2) When an attorney drafts a donative instrument making a gift to a care
10 custodian, and the attorney has no connection to the care custodian, the
11 proposed law would expressly allow the attorney to certify that the gift is
12 not the product of fraud or undue influence.⁷⁹ This would help transferors to
13 complete such gifts, without the need for the services of two different
14 attorneys. The attorney who drafts a donative instrument for a client is in a
15 good position to counsel and evaluate the client and determine whether the
16 gift is improper.

17 **Effect of Failed Gift**

18 If a gift fails as a result of the statutory presumption of fraud or undue influence,
19 the beneficiary is treated as having predeceased the transferor, without spouse or
20 issue, but only to the extent that the value of the invalid gift exceeds the amount
21 that the beneficiary would have received as an heir if the transferor had died
22 intestate.⁸⁰ In other words, the beneficiary of a failed gift would still receive an
23 amount equal to that person’s hypothetical intestate share.

24 The intestate share exception appears to serve no purpose. A gift to an “heir” is
25 exempt from the statutory presumption.⁸¹ Consequently, the only gifts that will fail
26 pursuant to the statutory presumption are gifts to non-heirs. By definition, non-
27 heirs are those persons who take nothing if a transferor dies intestate.⁸² It is
28 meaningless to guarantee an intestate share to those who have no rights in
29 intestacy.

30 In addition to that technical problem, it is not clear why a person who is
31 presumed to have procured a gift through fraud or undue influence should receive
32 anything from the transferor’s estate.

33 The proposed law would continue the existing rule as to the effect of a failed
34 gift, but without the exception for an intestate share.⁸³ Thus, a beneficiary who

77. See proposed Prob. Code § 21370 *infra*.

78. See California Rules of Professional Conduct 3-310(b)(1) & (3).

79. See proposed Prob. Code § 21384(c) *infra*.

80. See Prob. Code § 21353.

81. See Prob. Code § 21351(a).

82. See Prob. Code § 44 (“heir” defined).

83. See proposed Prob. Code § 21386 *infra*.

1 fails to rebut the statutory presumption would be treated as having predeceased the
2 transferor without spouse or issue, and would take nothing.

3 **Statute of Limitations**

4 Existing law provides special timing rules for the commencement of an action to
5 challenge a gift under the statutory presumption.⁸⁴ Those rules are more relaxed
6 than the general rules for commencing a contest of a will⁸⁵ or trust.⁸⁶

7 The proposed law would not continue the special statute of limitation rules.
8 Instead, the general rules on when a contest may be commenced would apply to a
9 contest filed under the proposed law. There is no clear policy reason to provide a
10 longer time period for a contest filed under the proposed law than is provided for
11 other similar contests.

12 **Degree of Kinship**

13 Two provisions of the existing statute make reference to a “degree of kinship.”⁸⁷
14 There is no guidance, in the Probate Code or any other California code, as to how
15 to calculate degrees of kinship. This may lead to confusion and inconsistency, both
16 in the provisions at issue in this recommendation as well as the many other statutes
17 that make reference to degrees of kinship or consanguinity.⁸⁸

84. Prob. Code § 21356.

85. Prob. Code § 8270(a).

86. In general, when a revocable trust becomes irrevocable, the trustee is required to serve notice on the beneficiaries of the trust, the heirs of a deceased settlor, and if the trust is charitable, on the Attorney General. Prob. Code § 16061.7. A person who receives that notice must commence an action to contest the trust, if any, within 120 days of service of the notice or 60 days after delivery of the terms of the trust, whichever is later. Prob. Code § 16061.8. Otherwise, the time to commence an action challenging a trust is three, four, or five years, depending on the grounds for the contest and whether personal or real property is involved. J. Duncan & A. Zabronsky, *California Trust and Probate Litigation* § 5.17, at 97-98 (Cal. Cont. Ed. Bar, 2005).

87. Prob. Code §§ 21350(b), 21351(g).

88. Civ. Code §§ 1102.2 (property transfer disclosure duty), 1103.1 (hazard disclosure on transfer of residential property), 1708.7 (tort of stalking); Code Civ. Proc. §§ 229 (juror bias), 566 (eligibility to serve as receiver), 641 (objection to referee), 1800 (assignment for benefit of creditors); Corp. Code §§ 308 (provisional director), 5225 (provisional director), 7225 (provisional director); Fam. Code §§ 6211 (“domestic violence” defined), 8705 (notice of adoption), 9321 (adoption); Food & Agric. Code § 62708.5 (marketing laws); Gov’t Code §§ 8893.3 (adequate wall anchorage), 8897.1 (delivery of earthquake guide to transferee of real property), 13113.8 (smoke detector requirements); Health & Safety Code §§ 7100 (disposition of human remains), 7105 (disposition of human remains), 24178 (human experimentation); Penal Code §§ 152.3 (reporting child abuse), 285 (crime of incest), 422 (criminal threats), 646.9 (crime of stalking), 836 (arrest without warrant), 3605 (witness to execution), 12028.5 (domestic violence); Prob. Code §§ 673 (power of appointment), 2111.5 (conservatorship), 2359 (conservatorship), 2403 (conservatorship), 6402 (intestate succession), 6402.5 (intestate succession); Veh. Code § 13803 (unsafe vehicle operation by family member); Welf. & Inst. Code §§ 319 (dependent children), 361.3 (dependent children), 361.5 (dependent children), 366.21 (dependent children), 366.22 (dependent children), 727.4 (dependent children), 11362 (medical assistance to children), 11400 (medical assistance to children).

1 In order to provide guidance on this issue, the proposed law would add general
2 rules of construction to the Probate Code.⁸⁹ Those provisions would be consistent
3 with former Probate Code Sections 251-253,⁹⁰ which were repealed on the
4 recommendation of the Law Revision Commission in 1982.⁹¹ At that time, it was
5 felt that the provisions were not necessary for purposes of the law governing wills
6 and intestate succession. Given the other contexts in which degree of kinship is
7 relevant, the Commission now believes that statutory guidance should be
8 provided.

89. See proposed Prob. Code § 13 *infra*.

90. See 1931 Cal. Stat. ch. 281.

91. *Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301, 2509 (1982).

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PROPOSED LEGISLATION

1 **Prob. Code §§ 21350-21356 (added). Presumption of Fraud or Undue Influence**

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

4 PART 3.5. PRESUMPTION OF FRAUD OR
5 UNDUE INFLUENCE

6 CHAPTER 1. DEFINITIONS

7 **§ 21360. Definitions**

8 21360. The definitions in this chapter govern the construction of this part.

9 **Comment.** Section 21360 is new.

10 **§ 21362. “Care custodian”**

11 21362. (a) “Care custodian” means a person who provides health or social
12 services to a dependent adult for remuneration, as a profession or occupation. The
13 compensation need not be paid by the dependent adult.

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

18 **Comment.** Section 21362 is similar to the last sentence of former Section 21350(c), except that
19 the definition of “care custodian” is now limited to a person who provides services for
20 compensation, as a profession or occupation.

21 Subdivision (b) provides an illustrative list of the sorts of services that are included in the term
22 “health and personal services.”

23 See also Section 56 (“person” defined).

24 **Note.** The Commission invites public comment on whether the list of services described in
25 proposed Section 21362(b) should be narrowed to exclude social services (i.e., housekeeping,
26 shopping, cooking, transportation, and assistance with finances.) The Commission also invites
27 comment on whether the types of services described in proposed Section 21362(b) should be
28 characterized in that provision as services involving “intimacy, privacy, and extended personal
29 contact.”

30 **§ 21364. “Cohabitant”**

31 21364. “Cohabitant” has the meaning provided in Section 13700 of the Penal
32 Code.

33 **Comment.** Section 21364 continues the second sentence of former Section 21351(a) without
34 substantive change, except that the definition is generalized so that it applies to every use of the
35 term “cohabitant” in this part.

1 **§ 21366. “Dependent adult”**

2 21366. “Dependent adult” means a person who, at the time of executing the
3 donative instrument at issue under this part, satisfied both of the following
4 requirements:

5 (a) The person was 18 years old or older.

6 (b) A court would have appointed a conservator for the person, under
7 subdivision (a) or (b) of Section 1801, if a petition for conservatorship had been
8 filed.

9 **Comment.** Section 21366 is new.

10 **§ 21368. “Domestic partner”**

11 21368. “Domestic partner” has the meaning provided in Section 297 of the
12 Family Code.

13 **Comment.** Section 21368 continues former Section 21350(d) and part of the first sentence of
14 former Section 21351(a), without substantive change.

15 **§ 21370. “Independent attorney”**

16 21370. “Independent attorney” means an attorney who has no legal, business,
17 financial, professional, or personal relationship with the beneficiary of a donative
18 transfer at issue under this part.

19 **Comment.** Section 21370 is new. The standard provided in this section is similar to California
20 Rules of Professional Conduct 3-310(b)(1) and (3). See also Section 21384 (independent attorney
21 review).

22 **§ 21372. “Interested witness”**

23 21372. (a) “Interested witness” means a subscribing witness to a will executed
24 under Section 6110, who is also a devisee of the will.

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

27 **Comment.** Section 21372 is consistent with the substance of former Section 6112(c).
28 “Interested witness” is limited to a witness to a will executed under Section 6110 and does not
29 include a witness to a will that is executed under Section 6111 (holographic will) or 6221
30 (California statutory will).

31 **§ 21374. “Related by blood or affinity”**

32 21374. (a) A person who is “related by blood or affinity” to a specified person
33 means any of the following persons:

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

35 (2) A relative within a specified degree of kinship to the specified person or
36 within a specified degree of kinship to the spouse or domestic partner of the
37 specified person.

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

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

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

3 **Comment.** Section 21374 restates the substance of former Section 21350(b) to make clear that
4 a spouse and domestic partner are treated in the same way under this provision.

5 See also Section 21368 (“domestic partner”).

6 CHAPTER 2. OPERATION AND EFFECT OF PRESUMPTION

7 § 21380. Presumption of fraud or undue influence

8 21380. (a) A provision of an instrument making a donative transfer to any of the
9 following persons is presumed to be the product of fraud or undue influence:

10 (1) The person who drafted the donative instrument.

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

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

16 (4) An interested witness.

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

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

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

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

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

29 **Comment.** Subdivision (a) of Section 21380 restates the substance of former Section 21350(a),
30 with two exceptions:

31 (1) Subdivision (a)(4) is new. It harmonizes former Section 6112(c) with the more detailed
32 approach taken in this part.

33 (2) In subdivision (a)(7), former Section 21350(a)(3) has been generalized to include the law
34 firm of a fiduciary of the transferor who transcribes a donative instrument or causes it to be
35 transcribed.

36 Subdivision (b) restates the substance of the first sentence of former Section 21351(d), with
37 three exceptions:

38 (1) The standard of proof has been changed to a preponderance of the evidence.

39 (2) The former limitation on proof by the testimony of the beneficiary is not continued.

40 (3) The presumption of menace and duress is not continued.

41 Subdivision (c) restates the substance of the second sentence of former Section 21351(d).

42 The burden of establishing the facts that give rise to the presumption under subdivision (a) is
43 borne by the person who contests the validity of a donative transfer under this section. See Evid.
44 Code § 500 (general rule on burden of proof).

1 See also Sections 21362 (“care custodian”), 21364 (“cohabitant”), 21366 (“dependent adult”),
2 21368 (“domestic partner”), 21372 (“interested witness”), 21374 (“related by blood or affinity”).

3 **Note.** Under existing law, the derivative disqualification of the relatives of a disqualified
4 person extends to the **third** degree of kinship. That rule would be continued in proposed Section
5 21380(a)(5). The Commission invites comment on whether the third degree of kinship is the
6 proper scope for this provision.

7 **§ 21382. Exceptions**

8 21382. Section 21380 does not apply to any of the following donative
9 instruments or transfers:

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

12 (b) A donative instrument that is drafted or transcribed by a person who is
13 related by blood or affinity, within the fifth degree, to the transferor or is the
14 cohabitant of the transferor.

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

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

22 (e) A donative transfer of property valued at \$5,000 or less, if the total value of
23 the estate equals or exceeds the amount stated in Section 13100.

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

26 **Comment.** Subdivisions (a) and (b) of Section 21382 restate the substance of former Section
27 21351(a) and (g), except that “heirs of the transferor” are no longer included in the exception, and
28 the former exemption of an instrument drafted by an exempt person has been generalized to
29 include an instrument that is transcribed by an exempt person.

30 Subdivision (c) continues former Section 21351(c) without substantive change.

31 Subdivision (d) continues former Section 21351(f) without substantive change.

32 Subdivision (e) continues former Section 21351(h) without substantive change.

33 Subdivision (f) continues former Section 21351(i) without substantive change.

34 See also Sections 21364 (“cohabitant”), 21374 (“related by blood or affinity”).

35 **Note.** Under existing law, the statutory presumption does not apply to a gift to a relative of
36 the transferor, or drafted by a relative of the transferor, within the **fifth** degree of kinship. That
37 rule would be continued in proposed Section 21382(a)-(b). The Commission invites comment on
38 whether the fifth degree of kinship is the proper scope for this provision.

39 **§ 21384. Attorney certification**

40 21384. (a) A gift is not subject to Section 21380 if the donative instrument is
41 reviewed by an independent attorney who counsels the transferor about the nature
42 and consequences of the intended transfer, attempts to determine if the intended
43 transfer is the result of fraud or undue influence, and signs and delivers to the
44 transferor an original certificate in substantially the following form:

1 “CERTIFICATE OF INDEPENDENT REVIEW

2 I, (attorney’s name), have reviewed (name of donative instrument) and counseled the
3 transferor, (name of transferor), on the nature and consequences of any transfers of
4 property to (name of person described in Probate Code Section 21380) that would be
5 made by the instrument.

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

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

12
13
14 _____
(Name of Attorney)

_____ (Date)”

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

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

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

26 **Comment.** Section 21384 restates the substance of former Section 21351(b), except that a
27 drafting attorney may conduct the review and certification of a gift to a care custodian.

28 See also Sections 21362 (“care custodian”), 21370 (“independent attorney”).

29 **Note.** Most of the references in Section 21384 to the reviewing attorney’s “client” have been
30 replaced with references to the “transferor.” It is the transferor’s intentions that the attorney must
31 assess, regardless of who is the client. The Commission invites comment on whether these
32 changes would cause any problems.

33 **§ 21386. Effect of invalid transfer**

34 21386. If a gift fails under this part, the instrument making the gift shall operate
35 as if the beneficiary had predeceased the transferor without spouse, domestic
36 partner, or issue.

37 **Comment.** Section 21386 restates the substance of former Section 21353. Language
38 purporting to guarantee the beneficiary of a failed gift an amount equal to the intestate share of
39 that beneficiary, had the transferor died intestate, is not continued. That language had no
40 substantive effect. Under former Section 21351(a) & (g), a gift to an “heir” of the transferor was
41 exempt from the presumption of invalidity established in Section 21350. Thus, the beneficiary of
42 a gift that failed under former Section 21350 could only be a non-heir. A non-heir, by definition,
43 is not entitled to an intestate share of the transferor’s estate. See Section 44 (“heir” defined).

44 See also Section 21368 (“domestic partner”).

1 **§ 21388. Liability of third party transferor**

2 21388. (a) No person shall be liable for transferring property pursuant to a
3 donative instrument that is subject to the presumption created under this part,
4 unless the person is served with notice, prior to transferring the property, that the
5 donative instrument has been contested under this part.

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

10 **Comment.** Section 21388 restates the substance of former Section 21352, except that the
11 provisions are now conditioned on service of notice that a contest has been filed or that the
12 validity of a contested transfer has been conclusively determined by a court.

13 **§ 21390. Contrary provision in instrument**

14 21390. This part applies notwithstanding a contrary provision in a donative
15 instrument.

16 **Comment.** Section 21390 continues former Section 21354 without substantive change.

17 **§ 21392. Application of part**

18 21392. (a) This part shall apply to instruments that become irrevocable on or
19 after September 1, 1993. For the purposes of this section, an instrument that is
20 otherwise revocable or amendable shall be deemed to be irrevocable if on
21 September 1, 1993, the transferor by reason of incapacity was unable to change
22 the disposition of the transferor's property and did not regain capacity before the
23 date of the transferor's death.

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

26 **Comment.** Subdivision (a) of Section 21392 continues former Section 21355 without
27 substantive change.

28 Subdivision (b) is new. It makes clear that this part supplements and does not supersede the
29 common law governing menace, duress, fraud, and undue influence. See *Bernard v. Foley*, 39
30 Cal. 4th 794, 800, 139 P.3d 1196, 47 Cal. Rptr. 3d 248 (2006); *Rice v. Clark*, 28 Cal. 4th 89, 97,
31 47 P.3d 300, 120 Cal. Rptr. 2d 522 (2002).

32 **CONFORMING AND TECHNICAL REVISIONS**

33 **Bus. & Prof. Code § 6103.6 (amended). Compensation for trustee services**

34 6103.6. Violation of Section 15687 of the Probate Code, or of Part 3.5
35 (commencing with Section ~~21350~~ 21360) of Division 11 of the Probate Code,
36 shall be grounds for discipline, if the attorney knew or should have known of the
37 facts leading to the violation. This section shall only apply to violations that occur
38 on or after January 1, 1994.

39 **Comment.** Section 6103.6 is amended to correct a reference to former Probate Code Section
40 21350.

1 **Prob. Code § 13 (added). Degree of kinship or consanguinity**

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

5 (b) Lineal kinship or consanguinity is the relationship between two persons, one
6 of whom is a direct descendant of the other. The degree of kinship between those
7 persons is determined by counting the generations separating the first person from
8 the second person. In counting the generations, the first person is excluded and the
9 second person is included. For example, parent and child are related in the first
10 degree of lineal kinship or consanguinity, grandchild and grandparent are related
11 in the second degree, and great-grandchild and great-grandparent are related in the
12 third degree.

13 (c) Collateral kinship or consanguinity is the relationship between two people
14 who spring from a common ancestor, but neither person is the direct descendent of
15 the other. The degree of kinship is determined by counting the generations from
16 the first person up to the common ancestor and from the common ancestor down
17 to the second person. In counting the generations, the first person is excluded, the
18 second person is included, and the common ancestor is counted only once. For
19 example, siblings are related in the second degree of collateral kinship or
20 consanguinity, an aunt or uncle and a niece or nephew are related in the third
21 degree, and first cousins are related in the fourth degree.

22 **Comment.** Subdivision (a) of Section 13 restates the substance of former Section 251, as
23 enacted by 1931 Cal. Stat. ch. 281.

24 Subdivision (b) restates the substance of former Section 252, as enacted by 1931 Cal. Stat. ch.
25 281.

26 Subdivision (c) restates the substance of former Section 253, as enacted by 1931 Cal. Stat. ch.
27 281. There is no first degree of collateral kinship or consanguinity.

28 **Prob. Code § 2583 (amended). Proposed actions by court**

29 2583. In determining whether to authorize or require a proposed action under
30 this article, the court shall take into consideration all the relevant circumstances,
31 which may include, but are not limited to, the following:

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

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

35 (c) The traits of the conservatee.

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

40 (e) The wishes of the conservatee.

41 (f) Any known estate plan of the conservatee (including, but not limited to, the
42 conservatee's will, any trust of which the conservatee is the settlor or beneficiary,
43 any power of appointment created by or exercisable by the conservatee, and any

1 contract, transfer, or joint ownership arrangement with provisions for payment or
2 transfer of benefits or interests at the conservatee's death to another or others
3 which the conservatee may have originated).

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

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

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

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

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

16 (l) Whether any beneficiary is a person described in ~~paragraph (1) of subdivision~~
17 ~~(b) of Section 21350~~ Section 21374.

18 (m) Whether a beneficiary has committed physical abuse, neglect, false
19 imprisonment, or fiduciary abuse against the conservatee after the conservatee was
20 substantially unable to manage his or her financial resources, or resist fraud or
21 undue influence, and the conservatee's disability persisted throughout the time of
22 the hearing on the proposed substituted judgment.

23 **Comment.** Section 2583(l) is amended to correct a reference to former Section 21350(b)(1).

24 **Note.** The Commission suspects that the reference in Section 2583(l) to a person described in
25 Section 21350(b)(1) may be erroneous. Section 21350(b)(1) defines what is meant by "related by
26 blood or marriage" and does not specify which person's relative, spouse, or domestic partner is at
27 issue, or why. It seems more likely that the intent was to reference a person in Section
28 21350(a)(1) (a person who drafts a donative instrument making a gift to the drafter) or in Section
29 21350(a) generally (disqualified persons generally). The Commission invites public comment on
30 whether Section 2583(l) needs to be substantively revised.

31 **Prob. Code § 6112 (amended). Witnesses**

32 6112. (a) Any person generally competent to be a witness may act as a witness
33 to a will.

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

36 ~~(c) Unless there are at least two other subscribing witnesses to the will who are~~
37 ~~disinterested witnesses, the fact that the will makes a devise to a subscribing~~
38 ~~witness creates a presumption that the witness procured the devise by duress,~~
39 ~~menace, fraud, or undue influence. This presumption is a presumption affecting~~
40 ~~the burden of proof. This presumption does not apply where the witness is a~~
41 ~~person to whom the devise is made solely in a fiduciary capacity.~~

42 ~~(d) If a devise made by the will to an interested witness fails because the~~
43 ~~presumption established by subdivision (c) applies to the devise and the witness~~

1 ~~fails to rebut the presumption, the interested witness shall take such proportion of~~
2 ~~the devise made to the witness in the will as does not exceed the share of the estate~~
3 ~~which would be distributed to the witness if the will were not established. Nothing~~
4 ~~in this subdivision affects the law that applies where it is established that the~~
5 ~~witness procured a devise by duress, menace, fraud, or undue influence.~~

6 A devise to a subscribing witness is governed by Section 21380.

7 **Comment.** Section 6112 is amended to delete the provisions relating to the presumption of
8 menace, duress, fraud, or undue influence that arises when a necessary subscribing witness of a
9 will is a devisee of the will. That presumption is now governed by Section 21380.

10 **Prob. Code § 15642 (amended). Removal of trustee**

11 15642. (a) A trustee may be removed in accordance with the trust instrument, by
12 the court on its own motion, or on petition of a settlor, cotrustee, or beneficiary
13 under Section 17200.

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

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

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

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

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

20 (5) Where the trustee's compensation is excessive under the circumstances.

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

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

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

38 "CERTIFICATE OF INDEPENDENT REVIEW

39 I, (attorney's name), have reviewed (name of instrument) and have counseled
40 my client, (name of client), fully and privately on the nature and legal effect of the
41 designation as trustee (name of trustee), ~~of~~ contained in that instrument. I am so
42 disassociated from the interest of the person named as trustee as to be in a position

1 to advise my client impartially and confidentially as to the consequences of the
2 designation. On the basis of this counsel, I conclude that the designation of a
3 person who would otherwise be subject to removal under paragraph (6) of
4 subdivision (b) of Section 15642 of the Probate Code is clearly the settlor's intent
5 and that intent is not the product of fraud, menace, duress, or undue influence.

6 _____ “
7 (Name of Attorney) (Date)

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

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

17 (7) If, as determined under Part 17 (commencing with Section 810) of Division
18 2, the trustee is substantially unable to manage the trust's financial resources or is
19 otherwise substantially unable to execute properly the duties of the office. When
20 the trustee holds the power to revoke the trust, substantial inability to manage the
21 trust's financial resources or otherwise execute properly the duties of the office
22 may not be proved solely by isolated incidents of negligence or improvidence.

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

27 (9) For other good cause.

28 (c) If, pursuant to paragraph (6) of subdivision (b), the court finds that the
29 designation of the trustee was not consistent with the intent of the settlor or was
30 the product of fraud, menace, duress, or undue influence, the person being
31 removed as trustee shall bear all costs of the proceeding, including reasonable
32 attorney's fees.

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

37 (e) If it appears to the court that trust property or the interests of a beneficiary
38 may suffer loss or injury pending a decision on a petition for removal of a trustee
39 and any appellate review, the court may, on its own motion or on petition of a
40 cotrustee or beneficiary, compel the trustee whose removal is sought to surrender
41 trust property to a cotrustee or to a receiver or temporary trustee. The court may
42 also suspend the powers of the trustee to the extent the court deems necessary.

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

3 **Comment.** Section 15642(b)(6) is amended to correct a reference to former Section 21350 and
4 to delete a superfluous word.

5 **Note.** The form set out in Section 15642(b)(6)(B) has been presented in simplified form, to
6 improve its readability without affecting its substance. The Commission is not proposing any
7 amendment to that provision, other than the change indicated in ~~strikeout~~.

8 **Prob. Code § 21306 (amended). Enforcement of no contest clause**

9 21306. (a) A no contest clause is not enforceable against a beneficiary to the
10 extent the beneficiary, with reasonable cause, brings a contest that is limited to one
11 or more of the following grounds:

12 (1) Forgery.

13 (2) Revocation.

14 (3) An action to establish the invalidity of any transfer described in Section
15 ~~21350~~ 21380.

16 (b) “Reasonable cause” is defined for the purposes of this section to mean that
17 the party filing the action, proceeding, contest, or objections has possession of
18 facts that would cause a reasonable person to believe that the allegations and other
19 factual contentions in the matter filed with the court may be proven or, if
20 specifically so identified, are likely to be proven after a reasonable opportunity for
21 further investigation or discovery.

22 **Comment.** Section 21306 is amended to correct a reference to former Section 21350.

23 **Note.** If SB 1264 (Harman) is enacted, the amendment to this provision will need to be
24 adjusted accordingly.

25 **Prob. Code § 16062 (amended). Accounting**

26 16062. (a) Except as otherwise provided in this section and in Section 16064,
27 the trustee shall account at least annually, at the termination of the trust, and upon
28 a change of trustee, to each beneficiary to whom income or principal is required or
29 authorized in the trustee’s discretion to be currently distributed.

30 (b) A trustee of a living trust created by an instrument executed before July 1,
31 1987, is not subject to the duty to account provided by subdivision (a).

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

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

1 under former Section 1120.1a may be satisfied by furnishing an account that
2 satisfies the requirements of Section 16063.

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

7 **Comment.** Section 16062(e) is amended to correct a reference to former Section 21350.5.

8 **Prob. Code §§ 21350-21356 (repealed). Limitations on transfers**

9 SEC. ____ Part 3.5 (commencing with Section 21350) of Division 11 of the
10 Probate Code is repealed.

11 **Comment.** The substance of former Part 3.5 is restated, with some changes, in Sections 21360
12 to 21392. See the Comments following those sections.

13 **Note.** The text of existing Part 3.5 is set out below for reference:

14 **§ 21350. Invalid transfers**

15 21350. (a) Except as provided in Section 21351, no provision, or provisions, of any
16 instrument shall be valid to make any donative transfer to any of the following:

17 (1) The person who drafted the instrument.

18 (2) A person who is related by blood or marriage to, is a domestic partner of, is a
19 cohabitant with, or is an employee of, the person who drafted the instrument.

20 (3) Any partner or shareholder of any law partnership or law corporation in which the
21 person described in paragraph (1) has an ownership interest, and any employee of that law
22 partnership or law corporation.

23 (4) Any person who has a fiduciary relationship with the transferor, including, but not
24 limited to, a conservator or trustee, who transcribes the instrument or causes it to be
25 transcribed.

26 (5) A person who is related by blood or marriage to, is a domestic partner of, is a
27 cohabitant with, or is an employee of a person who is described in paragraph (4).

28 (6) A care custodian of a dependent adult who is the transferor.

29 (7) A person who is related by blood or marriage to, is a domestic partner of, is a
30 cohabitant with, or is an employee of, a person who is described in paragraph (6).

31 (b) For purposes of this section, “a person who is related by blood or marriage” to a person
32 means all of the following:

33 (1) The person’s spouse or predeceased spouse.

34 (2) Relatives within the third degree of the person and of the person’s spouse.

35 (3) The spouse of any person described in paragraph (2).

36 In determining any relationship under this subdivision, Sections 6406, 6407, and Chapter 2
37 (commencing with Section 6450) of Part 2 of Division 6 shall be applicable.

38 (c) For purposes of this section, the term “dependent adult” has the meaning as set forth in
39 Section 15610.23 of the Welfare and Institutions Code and also includes those persons who
40 (1) are older than age 64 and (2) would be dependent adults, within the meaning of Section
41 15610.23, if they were between the ages of 18 and 64. The term “care custodian” has the
42 meaning as set forth in Section 15610.17 of the Welfare and Institutions Code.

43 (d) For purposes of this section, “domestic partner” means a domestic partner as defined
44 under Section 297 of the Family Code.

45 **§ 21350.5. “Disqualified person” defined**

46 21350.5. For purposes of this part, “disqualified person” means a person specified in
47 subdivision (a) of Section 21350, but only in cases where Section 21351 does not apply.

1 § 21351. Exceptions

2 21351. Section 21350 does not apply if any of the following conditions are met:

3 (a) The transferor is related by blood or marriage to, is a cohabitant with, or is the
4 registered domestic partner, pursuant to Division 2.5 (commencing with Section 297) of the
5 Family Code, of the transferee or the person who drafted the instrument. For purposes of this
6 section, "cohabitant" has the meaning set forth in Section 13700 of the Penal Code. This
7 subdivision shall retroactively apply to an instrument that becomes irrevocable on or after
8 July 1, 1993.

9 (b) The instrument is reviewed by an independent attorney who (1) counsels the client
10 (transferor) about the nature and consequences of the intended transfer, (2) attempts to
11 determine if the intended consequence is the result of fraud, menace, duress, or undue
12 influence, and (3) signs and delivers to the transferor an original certificate in substantially the
13 following form, with a copy delivered to the drafter:

14 "CERTIFICATE OF INDEPENDENT REVIEW

15 I, _____, have reviewed
16 (attorney's name)

17 _____ and counseled my client,
18 (name of instrument)

19 _____ on the nature
20 (name of client)

21 and consequences of the transfer, or transfers, of property to:

22 _____ contained in the instrument.
23 (name of potentially disqualified person)

24 I am so disassociated from the interest of the transferee as to be in a position to advise my
25 client independently, impartially, and confidentially as to the consequences of the transfer. On
26 the basis of this counsel, I conclude that the transfer, or transfers, in the instrument that
27 otherwise might be invalid under Section 21350 of the Probate Code are valid because the
28 transfer, or transfers, are not the product of fraud, menace, duress, or undue influence.
29

30 _____"
31 (Name of Attorney) (Date)

32 Any attorney whose written engagement signed by the client is expressly limited solely to
33 the preparation of a certificate under this subdivision, including the prior counseling, shall not
34 be considered to otherwise represent the client.

35 (c) After full disclosure of the relationships of the persons involved, the instrument is
36 approved pursuant to an order under Article 10 (commencing with Section 2580) of Chapter 6
37 of Part 4 of Division 4.

38 (d) The court determines, upon clear and convincing evidence, but not based solely upon
39 the testimony of any person described in subdivision (a) of Section 21350, that the transfer
40 was not the product of fraud, menace, duress, or undue influence. If the court finds that the
41 transfer was the product of fraud, menace, duress, or undue influence, the disqualified person
42 shall bear all costs of the proceeding, including reasonable attorney's fees.

43 (e) Subdivision (d) shall apply only to the following instruments:

44 (1) Any instrument other than one making a transfer to a person described in paragraph (1)
45 of subdivision (a) of Section 21350.

46 (2) Any instrument executed on or before July 1, 1993, by a person who was a resident of
47 this state at the time the instrument was executed.

48 (3) Any instrument executed by a resident of California who was not a resident at the time
49 the instrument was executed.
50
51
52
53

1 (f) The transferee is a federal, state, or local public entity, an entity that qualifies for an
2 exemption from taxation under Section 501(c)(3) or 501(c)(19) of the Internal Revenue Code,
3 or a trust holding an interest for this entity, but only to the extent of the interest of the entity,
4 or the trustee of this trust. This subdivision shall retroactively apply to an instrument that
5 becomes irrevocable on or after July 1, 1993.

6 (g) For purposes of this section, “related by blood or marriage” shall include persons within
7 the fifth degree or heirs of the transferor.

8 (h) The transfer does not exceed the sum of three thousand dollars (\$3,000). This
9 subdivision shall not apply if the total value of the property in the estate of the transferor does
10 not exceed the amount prescribed in Section 13100.

11 (i) The transfer is made by an instrument executed by a nonresident of California who was
12 not a resident at the time the instrument was executed, and that was not signed within
13 California.

14 **§ 21352. Third party liability**

15 21352. No person shall be liable for making any transfer pursuant to an instrument that is
16 prohibited by this part unless that person has received actual notice of the possible invalidity
17 of the transfer to the disqualified person under Section 21350 prior to making the transfer. A
18 person who receives actual notice of the possible invalidity of a transfer prior to the transfer
19 shall not be held liable for failing to make the transfer unless the validity of the transfer has
20 been conclusively determined by a court.

21 **§ 21353. Effect of invalid transfer**

22 21353. If a transfer fails under this part, the transfer shall be made as if the disqualified
23 person predeceased the transferor without spouse or issue, but only to the extent that the value
24 of the transfer exceeds the intestate interest of the disqualified person.

25 **§ 21354. Contrary provision in instrument**

26 21354. This part applies notwithstanding a contrary provision in the instrument.

27 **§ 21355. Application of part**

28 21355. This part shall apply to instruments that become irrevocable on or after September
29 1, 1993. For the purposes of this section, an instrument which is otherwise revocable or
30 amendable shall be deemed to be irrevocable if on September 1, 1993, the transferor by
31 reason of incapacity was unable to change the disposition of his or her property and did not
32 regain capacity before the date of his or her death.

33 **§ 21356. Commencement of action**

34 21356. An action to establish the invalidity of any transfer described in Section 21350 can
35 only be commenced within the periods prescribed in this section as follows:

36 (a) In case of a transfer by will, at any time after letters are first issued to a general
37 representative and before an order for final distribution is made.

38 (b) In case of any transfer other than by will, within the later of three years after the
39 transfer becomes irrevocable or three years from the date the person bringing the action
40 discovers, or reasonably should have discovered, the facts material to the transfer.
41