

STATE OF CALIFORNIA

**CALIFORNIA LAW  
REVISION COMMISSION**

**2008-2009 RECOMMENDATIONS**

Donative Transfer Restrictions..... 107

Attorney-Client Privilege After Client’s Death..... 163

Revision of No Contest Clause Statute:  
    Conforming Revisions .....203

February 2009

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739  
[www.clrc.ca.gov](http://www.clrc.ca.gov)

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## NOTE

The Commission's reports, recommendations, and studies are published in separate pamphlets that are later bound in hardcover form. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound, which permits citation to Commission publications before they are bound.

This publication (#232) will appear in Volume 38 of the Commission's *Reports, Recommendations, and Studies*.

Commission publications and other materials are available on the Internet at [www.clrc.ca.gov](http://www.clrc.ca.gov).

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

RECOMMENDATION

## **Donative Transfer Restrictions**

October 2008

California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, CA 94303-4739  
[www.clrc.ca.gov](http://www.clrc.ca.gov)

#### NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Donative Transfer Restrictions*, 38 Cal. L. Revision Comm'n Reports 107 (2008). This is part of publication #232.

STATE OF CALIFORNIA

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October 29, 2008

To: The Honorable Arnold Schwarzenegger  
*Governor of California*, and  
The Legislature of California

Chapter 215 of the Statutes of 2006 directs the Law Revision Commission to conduct 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.” Disqualified persons include the drafter of the donative instrument, a fiduciary who transcribes the donative instrument or causes it to be transcribed, the care custodian of a dependent adult, and certain close relatives and business associates of any of those persons.

The Commission has completed its review and finds that the basic policy served by the statute is sound, but that there are problems with its scope of application and the details of its implementation.

The Commission recommends that the statute be revised 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 (thereby excluding personal friends and other volunteers).
- (3) 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.
- (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 make a number of minor changes to reconcile inconsistencies, add statutory guidance on how to calculate “degrees” of kinship, and resolve other technical problems.

Respectfully submitted,

Pamela L. Hemminger  
*Chairperson*

## ACKNOWLEDGMENTS

Comments from knowledgeable persons are invaluable in the Commission's study process. The Commission would like to express its appreciation to the individuals and organizations who have taken the time to share their thoughts with the Commission.

Inclusion of the name of an individual or organization should not be taken as an indication of the individual's opinion or the organization's position on any aspect of this recommendation. The Commission regrets any errors or omissions that may have been made in compiling these acknowledgments.

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## DONATIVE TRANSFER RESTRICTIONS

### BACKGROUND

In 1993, it was reported that a California estate planning attorney was exploiting his elderly clients by drafting estate plans for them that included large gifts to himself and his colleagues.<sup>1</sup> In response to those reported abuses, the Legislature enacted Probate Code Sections 21350 to 21356 (hereafter, “Donative Transfer Restriction Statute”), which establish a statutory presumption of menace, duress, fraud, or undue influence when an instrument<sup>2</sup> makes a gift to the person who drafted or transcribed the instrument.<sup>3</sup> The statutory presumption acts as a supplement to the common law on menace, duress, fraud, and undue influence.<sup>4</sup> A gift that does not fall within the scope of the statutory presumption can still be challenged under the common law.

The statutory presumption was expanded in 1997,<sup>5</sup> so that it also applies to a gift made by a “dependent adult”<sup>6</sup> to that

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

2. “‘Instrument’ means a will, trust, deed, or other writing that designates a beneficiary or makes a donative transfer of property.” Prob. Code § 45.

3. 1993 Cal. Stat. ch. 293.

4. 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).

5. 1997 Cal. Stat. ch. 724.

6. 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).

person's "care custodian."<sup>7</sup> That change was proposed by the Trusts and Estates Section of the State Bar, to address concern that "practical nurses" were taking financial advantage of "dementing seniors."<sup>8</sup>

The application of the statutory presumption to a care custodian has been criticized as overbroad.<sup>9</sup> In 2006, the Chief Justice of the California Supreme Court raised a similar concern and suggested that the Legislature review the application of the statute to a care custodian.<sup>10</sup> Later that year, a statute was enacted directing the California Law Revision Commission to conduct a comprehensive study of the operation of the Donative Transfer Restriction Statute.<sup>11</sup>

This recommendation reports the Commission's findings and includes proposed legislation to remedy problems that exist in the current statute.

## OVERVIEW OF EXISTING LAW

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

Under existing law, a gift to a "disqualified person" is presumed to be invalid, as the product of menace, duress, fraud or undue influence.<sup>12</sup> Clear and convincing evidence is

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7. See Prob. Code § 21350(c) (incorporating definition of "care custodian" from Welf. & Inst. Code § 15610.17).

8. 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).

9. See, e.g., Letter from Sam Crump to Jody Remke, California Judges Association (June 26, 1997) (on file with Commission); K. Kwasneski, *Comment: 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).

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

11. 2006 Cal. Stat. ch. 215 (AB 2034 (Spitzer)).

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

required to rebut the presumption.<sup>13</sup> The rebuttal evidence must include evidence other than the testimony of a disqualified person.<sup>14</sup> A disqualified person who unsuccessfully attempts to rebut the presumption bears all of the costs of the proceeding, including reasonable attorney's fees.<sup>15</sup>

### **Disqualified Persons**

There are four classes of "disqualified persons":

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

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

### **Statutory Exceptions**

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

- (1) The disqualified person is a close relation or cohabitant of the transferor.<sup>20</sup>

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13. Prob. Code § 21351(d).

14. *Id.*

15. *Id.*

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

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

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

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

- (2) The instrument was drafted by a close relation or cohabitant of the transferor.<sup>21</sup>
- (3) The instrument is executed by a conservator on behalf of a conservatee and is approved by the court under the procedures for substituted judgment.<sup>22</sup>
- (4) The beneficiary is a public entity or tax-exempt nonprofit entity.<sup>23</sup>
- (5) The gift is valued at \$3,000 or less, if the estate is valued at \$100,000 or more.<sup>24</sup>
- (6) The instrument is executed outside of California by a transferor who is not a resident of California at the time of execution.<sup>25</sup>

### **Independent Attorney Certification**

In addition to the categorical exceptions, there is a validating procedure that can be used to avoid the statutory presumption of menace, duress, fraud, or undue influence. The statutory presumption does not apply if a gift is reviewed by an independent attorney who counsels the transferor about the nature and consequences of the gift and certifies that the gift is not the product of menace, duress, fraud, or undue influence.<sup>26</sup>

### **Effect of Failed Transfer**

If a gift fails as a result of the statutory presumption, the instrument operates as if the disqualified person had predeceased the transferor, without spouse or issue, but only

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20. Prob. Code § 21351(a), (g).

21. *Id.*

22. Prob. Code § 21351(c).

23. Prob. Code § 21351(f).

24. Prob. Code § 21351(h).

25. Prob. Code § 21351(i).

26. Prob. Code § 21351(b).

to the extent that the value of the gift exceeds what the disqualified person would have received if the transferor had died intestate.<sup>27</sup>

### **Commencement of Action**

The time to commence an action to challenge a gift under Section 21350 depends on the nature of the instrument at issue. In the case of a will, the action must be commenced before an order for final distribution is made.<sup>28</sup> For any other instrument, the action must be commenced within the later of three years after the instrument becomes irrevocable or three years after the contestant discovers, or reasonably should have discovered, the facts material to the transfer.<sup>29</sup>

## **ANALYSIS AND RECOMMENDATIONS**

### **General Policy**

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

The Commission finds no reason to question that general approach. It is consistent with the approach taken under the common law on undue influence, which includes a presumption of undue influence when certain factual indicia of undue influence are established.<sup>30</sup> The factual grounds for

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27. Prob. Code § 21353.

28. Prob. Code § 21356.

29. *Id.*

30. 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 instrument, 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).

the common law presumption differ from the grounds for the statutory presumption, but the general principle is the same.

The statutory presumption established by Probate Code Section 21350 is also similar to another existing statutory presumption that arises when a will makes a devise to a necessary witness of the will.<sup>31</sup> In both cases, the Legislature has determined that certain facts surrounding the creation of an instrument create a significant enough risk of menace, duress, fraud, or undue influence as to justify imposing a rebuttable presumption.

Probate Code Section 21350 supplements the common law; it does not preempt it.<sup>32</sup> That is appropriate. There will be many circumstances that do not fall within the scope of the statutory presumption but that nonetheless involve the use of menace, duress, fraud, or undue influence to procure a gift. Such gifts can be contested under established common law principles.

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

### **Menace and Duress**

Under the existing statute, a gift to a disqualified person is presumed to be the product of menace, duress, fraud, or undue influence.<sup>33</sup> If the presumption is not rebutted by the disqualified person, the gift fails.<sup>34</sup>

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31. See Prob. Code § 6112.

32. 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).

33. Prob. Code §§ 21350(a), 21351(d).

34. Prob. Code § 21353.

That approach is reasonable with respect to the presumption of fraud and undue influence. The circumstances governed by the statutory presumption bear many of the common law indicia of fraud and undue influence, including a confidential relationship between the transferor and beneficiary, beneficiary participation in the creation of the gift, undue profit, an opportunity for the beneficiary to exert undue influence, and vulnerability of the transferor to undue influence.<sup>35</sup>

This is not true for menace and duress. Menace and duress are terms of art that describe extreme forms of coercion, often rising to the level of criminal misconduct.<sup>36</sup>

The Commission does not believe that the statutory presumption should encompass menace and duress. The fact that a beneficiary of a gift drafted or transcribed the instrument, or served as the care custodian of the transferor, does not justify a presumption that the gift was procured through the extreme forms of misconduct that constitute menace and duress. Under these facts, the beneficiary should

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

36. Civ. Code § 1569 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 harrassing [sic] or oppressive.

Civ. Code § 1570 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.

not be required to prove the absence of menace and duress in order to receive a gift.

The proposed law would not continue the presumption of menace and duress.<sup>37</sup>

### **Drafter or Transcriber of Instrument as Disqualified Person**

Under existing law, the class of “disqualified persons” includes a beneficiary who either (1) drafted the instrument that makes the gift, or (2) was a fiduciary of the transferor and transcribed the instrument (or caused it to be transcribed).<sup>38</sup>

The Commission finds no reason to question that approach. It is consistent with the common law presumption of undue influence that arises when a beneficiary is in a confidential relationship with a transferor, participates in the creation of the gift, and receives an undue profit.<sup>39</sup> A drafter or fiduciary transcriber of an instrument is often in a confidential relationship with the transferor, directly participates in creating the gift, and will often appear to receive undue profit.<sup>40</sup>

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

38. Prob. Code § 21350(a)(1) & (4).

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

40. 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.”).



## Care Custodian as Disqualified Person

### *Existing Law*

The existing definition of “care custodian” is very broad. It includes any “person providing health services or social services.”<sup>41</sup> Such services can include the administration of medicine, cleaning and bandaging injuries, bathing, assisting with the toilet, shopping, cooking, housekeeping, and assisting with finances.<sup>42</sup>

Two appellate decisions concluded that the definition of “care custodian” was limited to a person who provides services as a profession or occupation, and not as the result of a preexisting personal relationship.<sup>43</sup> As one of the decisions explained:

This interpretation of the term “care custodian” as used in section 21350 achieves the prophylactic purpose of the statute by protecting dependent adults from the predatory practices of individuals who misuse their professional positions to obtain personal favors, without doing violence to those authentic personal relationships in which care giving is the natural outgrowth of long-standing friendship, affection and genuine charity.<sup>44</sup>

That interpretation of “care custodian” was directly overruled by the California Supreme Court, which held that there is no exception for a person who provides services out

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41. See *Bernard v. Foley*, 39 Cal. 4th 794, 799-800, 807, 139 P.3d 1196, 47 Cal. Rptr. 3d 248 (2006) (interpreting Welf. & Inst. Code § 15610.17).

42. *Id.* at 805-06.

43. See *Conservatorship of McDowell*, 125 Cal. App. 4th 659, 673-74, 23 Cal. Rptr. 3d 10 (2004); *Conservatorship of Davidson*, 113 Cal. App. 4th 1035, 1048-50, 6 Cal. Rptr. 3d 702 (2003).

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

of friendship or charity.<sup>45</sup> The Court's holding was based mainly on statutory interpretation and legislative history:

In short, neither the statutory language nor the legislative history supports a preexisting personal friendship exception to section 21350's presumptive disqualification of care custodian donees. It is not for us to gainsay the wisdom of this legislative choice. In the event, however, we have mistaken the Legislature's intention, that body may readily correct our error.<sup>46</sup>

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

[N]otwithstanding our customary and proper reticence in encouraging legislative action, in the present context I believe the Legislature would do well to consider modifying or augmenting the relevant provisions in order to more fully protect the interests of dependent adults and society as a whole, by according separate treatment to longer term care custodians who undertake that role as a consequence of a personal relationship rather than as an occupational assignment.<sup>47</sup>

In a dissenting opinion, three justices argued that the statutory presumption does not and should not apply to a person who provides care services as a friend or volunteer, rather than as a profession or occupation:<sup>48</sup>

While it is certainly true that nonprofessionals may take advantage of the infirm, it is also true that the kind and generous may act graciously to ease the suffering of those in need. The motives at play in any given case is the kind of

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45. *Bernard*, 39 Cal. 4th at 806-07.

46. *Id.* at 813.

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

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

factual question the trial court exists to resolve. Absent a clear legislative pronouncement to the contrary, we should allow the court to do so without an artificially imposed presumption.<sup>49</sup>

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

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

- (1) *Opportunity to exert undue influence.* The opportunity to exert undue influence on a transferor is one of the common law indicia of undue influence.<sup>50</sup> The intimacy, privacy, and duration of a care custodian relationship provides a significant opportunity to exert undue influence on a dependent adult.
- (2) *Special vulnerability to undue influence.* Undue influence is influence that “overcomes the will without convincing the judgment.”<sup>51</sup> Demonstrated vulnerability of a transferor to such influence can be offered as evidence of undue influence.<sup>52</sup> Because a transferor may be dependent on a care custodian for assistance with the necessities of life, often including assistance with personal matters, the transferor may be unusually vulnerable to influence from the care custodian. Furthermore, the dependency relationship may result from physical or cognitive impairments (e.g., incipient dementia, chronic pain, depression) that could make the transferor more vulnerable to pressure and manipulation.

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49. *Id.* at 824.

50. See 64 Cal. Jur. 3d *Wills* § 187 (2008).

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

52. See 64 Cal. Jur. 3d *Wills* § 188 (2008).

- (3) *Unnatural gift.* The claim that a gift is “unnatural” is also a recognized indicia of undue influence.<sup>53</sup> An estate plan may be considered unnatural if it provides a large gift to a person who is not related to the transferor or is remotely related, while providing a less generous gift to close relations (the “natural objects” of the transferor’s bounty). Because Probate Code Section 21351 exempts close family members and small gifts, the statutory presumption will only operate when a relatively large gift is made to a non-relative (or remote relative). Under those facts, the gift to the care custodian may appear “unnatural.”

### *Analysis and Recommendation*

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

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

The question of whether a gift appears natural is a critical distinction in determining whether the gift should be subject to the statutory presumption of undue influence. The existing

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53. See, e.g., *In re Finkler’s Estate*, 3 Cal. 2d 584, 589, 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).

treatment of gifts to family members demonstrates the importance of that factor.

A recent study found that over 85% of confirmed cases of elder financial abuse were perpetrated by relatives of the abused elder.<sup>54</sup> Despite the prevalence of abuse by relatives, family members are exempt from the statutory presumption of undue influence. The reason for that apparent incongruity seems clear. Family members are also the most likely intended beneficiaries of an at-death transfer. The “naturalness” of a gift to a family member weighs heavily against the presumption that such a gift was the product of undue influence. Nor is there anything inherently suspicious about a family member providing care services to a dependent relative. Such assistance is expected and beneficial.

The same principles would seem to apply, though with less force, to a gift to a friend, neighbor, or Good Samaritan who provides voluntary services to a dependent adult. A gift to such a person is not so “unnatural” as to justify the presumptive invalidation of the gift.

The facts in *Conservatorship of Davidson*<sup>55</sup> illustrate this point. In that case, the “care custodian” had been close friends with the transferor for 30 years before the transferor became disabled. The friend then provided a range of health and social services to the transferor, as a volunteer. The transferor’s decision to leave a large gift to her long-time friend seems as natural as a decision to leave a gift to a relative.

For the reasons discussed above, the Commission recommends that volunteer caregivers be excluded from the

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54. National Center on Elder Abuse, *National Elder Abuse Incidence Study*, 4-29 (1998). By contrast, in-home service providers were responsible for only 1.7% of the substantiated cases of elder financial abuse, with in-patient service providers responsible for 4.1% of elder financial abuse. *Id.*

55. 113 Cal. App. 4th 1035, 6 Cal. Rptr. 3d 702 (2003).

definition of “care custodian.”<sup>56</sup> A gift to a volunteer caregiver could still be challenged under the common law on fraud and undue influence, but would not be presumed to be the product of fraud and undue influence.

The Commission also recommends that the definition of “care custodian” be narrowed in another way. Under existing law, the definition of “care custodian” is borrowed from Welfare and Institutions Code Section 15610.17,<sup>57</sup> which uses the term in defining those persons who are legally required to report elder abuse.<sup>58</sup> That definition is very broad, and includes persons who should be required to report elder abuse, but who do not present the risk of undue influence that the Donative Transfer Restriction Statute is meant to address (e.g., the definition expressly includes animal control officers, fire fighters, and building inspectors).<sup>59</sup>

The Commission does not see any benefit to defining “care custodian” by reference to the lengthy list of persons who are required to report elder abuse and recommends against continuing that part of the definition.<sup>60</sup>

### **Dependent Adult**

The care custodian provision only applies if the transferor is a dependent adult.<sup>61</sup> So, for example, a gift to a transferor’s physician or housekeeper would not be presumed to be the product of fraud or undue influence unless the transferor is a dependent adult.

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

57. Prob. Code § 21350(c).

58. Welf. & Inst. Code § 15630(a).

59. Welf. & Inst. Code § 15610.17(v)-(x).

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

61. Prob. Code § 21350(a)(6).

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

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

The risk of undue influence may also be heightened by the physical or mental condition of a dependent adult. A transferor with dementia, chronic pain, fatigue, or other disabling conditions may have a lowered resistance to pressure. That may explain why, under existing law, the definition of “dependent adult” requires that the transferor be disabled.<sup>62</sup>

Nonetheless, the Commission believes that the existing definition of “dependent adult” is overbroad for the purposes of the statutory presumption of fraud or undue influence. It includes all persons with disabilities as a class, without any individualized determination of whether a person’s disability actually causes any special vulnerability to fraud or undue influence. The existing presumption applies equally to an 80-year-old with incipient dementia and a 20-year-old with a spinal injury.

Defining “dependent adult” to include any person with a disability places a special burden on the testamentary freedom of all persons with disabilities, many of whom are completely

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62. “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).

independent and have no special vulnerability to fraud or undue influence.

The Commission recommends a different approach. Rather than presume the invalidity of any gift made by a disabled person to a care custodian, the proposed law would instead define “dependent adult” as an adult who is unable to provide for his or her own personal needs, unable to manage his or her own finances, or unable to resist fraud or undue influence.<sup>63</sup> This standard would be familiar to estate planners and probate judges, as it is derived from the substantive criteria for appointment of a conservator.<sup>64</sup>

That approach would require an individualized assessment of whether a transferor is actually in need of protection. It would avoid imposing blanket restrictions on the testamentary freedom of all persons who have disabilities, but who are able to manage their own affairs and resist fraud and undue influence. This individualized approach is consistent with the modern trend in the law, which increasingly avoids any presumption of incapacity for those who have disabling conditions.<sup>65</sup>

### **Timing Limitation**

The Commission recommends that the presumption of fraud or undue influence that applies to a gift from a dependent adult to a care custodian should only apply if the instrument was executed during the period in which the care

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

64. See Prob. Code § 1801(a)-(b).

65. See, e.g., Prob. Code § 811 (requiring functional analysis of individual’s condition in determining decision-making capacity). “The mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act.” Prob. Code § 811(d).



custodian provided care services.<sup>66</sup> An instrument executed before the commencement of care services or after the termination of care services is unlikely to have been the product of fraud or undue influence exerted through the care custodian relationship. If there is evidence that such a gift is the product of fraud or undue influence, it could be contested under the common law, without the benefit of the statutory presumption.

### **Interested Witness of Will**

Under Probate Code Section 6112, there is a presumption of menace, duress, fraud, or undue influence when a will makes a devise to a necessary witness of the will. This reflects the same general policy effectuated by Probate Code Section 21350. However, the two statutes differ significantly in their details.<sup>67</sup>

The Commission sees no policy reason to treat a devise to an interested witness of a will differently from other gifts that are presumed, by statute, to be the product of fraud or undue influence.

The proposed law would harmonize the treatment of all such gifts, significantly modernizing the law that governs the interested witness presumption. This would be achieved by including an interested witness within the scope of the

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

67. *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). See also Evid. Code § 115 (“Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.”) Also, the interested witness presumption is not subject to the exceptions provided in Section 21351, the independent attorney certification procedure provided in Section 21351(b), or the third party protections provided by Section 21352.

Donative Transfer Restriction Statute and eliminating the separate rules provided in Section 6112.<sup>68</sup>

### **Derivative Disqualification**

Under existing law, the spouse, domestic partner, close relative, cohabitant, or business associate of a disqualified person is also treated as a disqualified person.<sup>69</sup> For example, if a person drafts a will that makes a gift to the drafter's spouse, that gift is also subject to the statutory presumption of menace, duress, fraud, or undue influence.

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

- The rule that disqualifies certain persons affiliated with the law firm of the drafting attorney would be generalized to also apply to certain persons affiliated with the law firm of a fiduciary transcriber.<sup>70</sup>
- The existing reference to a “law partnership or law corporation” would be replaced with a general reference to a “law firm,” so as to include a limited liability company, sole proprietorship, or any other type of business entity.<sup>71</sup>
- The definition of “related by blood and marriage” would be revised to fully harmonize the treatment of spouses and domestic partners.<sup>72</sup>
- The definition of “cohabitant” would be generalized so that it applies to all uses of the term.<sup>73</sup>

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

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

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

71. *Id.*

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

### Categorical Exceptions

Existing law exempts certain beneficiaries and instruments from the operation of the statutory presumption.<sup>74</sup>

The proposed law would continue those exceptions, with the following minor improvements:

- The definition of “related by blood or marriage” would be generalized so that it applies to all uses of the term.<sup>75</sup>
- The exception for gifts to an “heir”<sup>76</sup> of the transferor would not be continued. The exemption of “heirs” is largely redundant, as existing law already exempts family members within the fifth degree. To the extent that the exemption of heirs is not redundant, it goes too far, by exempting remote relatives.
- The exemption for an instrument that is drafted by the transferor’s spouse, domestic partner, cohabitant, or relative within the fifth degree of kinship would be extended to also govern an instrument that is transcribed by the transferor’s spouse, domestic partner, cohabitant, or relative.<sup>77</sup>

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

74. See Prob. Code § 21351(a), (gift to transferor’s spouse, domestic partner, cohabitant, relative within fifth degree; 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) (gift to public or nonprofit entity), (h) (small gift), (i) (instrument executed out of state by nonresident).

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

76. See Prob. Code § 44 (“‘Heir’ means any person, including the surviving spouse, who is entitled to take property of the decedent by intestate succession under this code.”).

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

- The exception for a small gift of \$3,000 or less would be increased to include a gift of \$5,000 or less.<sup>78</sup>

### **Rebuttal of the Presumption**

Under existing law, the statutory presumption can only be rebutted by clear and convincing evidence,<sup>79</sup> which must include some evidence other than the testimony of the beneficiary.<sup>80</sup> Furthermore, the presumption appears to be conclusive as to some drafters of instruments.<sup>81</sup>

None of those evidentiary restrictions apply to (1) the common law presumption of undue influence, or (2) the presumption that arises when a will makes a devise to a necessary witness. A preponderance of the evidence is sufficient to rebut those presumptions.<sup>82</sup>

This difference in treatment is counter-intuitive. Logically, the difficulty of rebutting the presumption should be proportional to the weight of the evidence supporting the presumption. Under existing law, the opposite is true. The prerequisites for the statutory presumption under the Donative Transfer Restriction Statute are easier to establish than the prerequisites for the common law presumption,<sup>83</sup> yet the

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

79. See Prob. Code § 21351(d).

80. *Id.*

81. 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 an instrument.

82. See Estate of Sarabia, 221 Cal. App. 3d 599, 604-05, 270 Cal. Rptr. 560 (1990) (common law presumption); 64 Cal. Jur. 3d *Wills* § 224 (2007) (same); Prob. Code § 6112(c) (interested witness); see also Evid. Code § 115.

83. 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).

presumption arising under the Donative Transfer Restriction Statute is harder to rebut (and in some cases appears to be conclusive).

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

The proposed law would not continue the strict evidentiary requirements for rebuttal of the statutory presumption.<sup>84</sup> A preponderance of the evidence would be sufficient to rebut the presumption.

### **Independent Attorney Certification**

Under existing law, the statutory presumption can be avoided if an independent attorney reviews the instrument, counsels the transferor about the nature and consequences of the transfer, and certifies that the gift is not the product of menace, duress, fraud, or undue influence.<sup>85</sup>

The proposed law would continue the substance of this saving mechanism, with the following changes:

- (1) A definition of “independent attorney” would be added to provide a clear standard as to the degree of disassociation required in order to provide an

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

85. Prob. Code § 21351(b).

independent attorney certification of a gift.<sup>86</sup> The standard borrows concepts from the Rules of Professional Conduct governing attorney conflicts of interest.<sup>87</sup> This would provide a familiar rule for attorneys who are asked to certify an instrument.

- (2) When an independent attorney drafts an instrument making a gift to a care custodian, the proposed law would allow the drafting attorney to certify that the gift is not the product of fraud or undue influence.<sup>88</sup> This would help transferors to complete such gifts, without the need for the services of two different attorneys. The attorney who drafts an instrument for a client is in a good position to counsel and evaluate the client and determine whether the gift is improper.

### **Effect of Failed Gift**

Under existing law, if a gift fails as a result of the statutory presumption of fraud or undue influence, the beneficiary is treated as having predeceased the transferor, without spouse or issue, but only to the extent that the value of the invalid gift exceeds the amount that the beneficiary would have received as an heir if the transferor had died intestate.<sup>89</sup> In other words, the beneficiary of a failed gift would still receive an amount equal to that person's hypothetical intestate share.

The intestate share exception appears to serve no purpose. A gift to an "heir" is already exempt from the statutory presumption.<sup>90</sup> Consequently, the only gifts that will fail are gifts to non-heirs. By definition, non-heirs are those persons

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

87. See California Rules of Professional Conduct 3-310(B)(1) & (3).

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

89. See Prob. Code § 21353.

90. See Prob. Code § 21351(a).

who take nothing if a transferor dies intestate.<sup>91</sup> It is meaningless to guarantee an intestate share to those who have no rights in intestacy.

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

The proposed law would continue the existing rule as to the effect of a failed gift, but without the exception for an intestate share.<sup>92</sup> Thus, a beneficiary who fails to rebut the statutory presumption would be treated as having predeceased the transferor without spouse or issue, and would take nothing.

### **Statute of Limitations**

Existing law provides special timing rules for the commencement of an action to challenge a gift under the statutory presumption.<sup>93</sup> Those rules are different from the general law governing the time to commence a contest of a will<sup>94</sup> or trust.<sup>95</sup>

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91. See Prob. Code § 44 ("heir" defined).

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

93. Prob. Code § 21356.

94. Prob. Code § 8270.

95. 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 2008).

The Commission recommends that the special statute of limitation rules not be continued. Instead, the general rules on when a contest may be commenced would apply to a contest filed under the proposed law. There is no clear policy reason to provide different time periods for filing a contest, depending on whether it is filed under the common law of undue influence or under the statutory presumption of undue influence.

### **Third Party Protection**

The Donative Transfer Restriction Statute provides express immunity from liability for a third party property holder who transfers property pursuant to the terms of an instrument, if the transfer is “prohibited” by the Donative Transfer Restriction Statute, and the third party lacks “actual notice of the possible invalidity of the transfer to the disqualified person.”<sup>96</sup> Conversely, a third party who relies on notice of the “possible invalidity of the transfer” in refusing to make the transfer, is not liable “unless the validity of the transfer has been conclusively determined by a court.”<sup>97</sup>

Those rules make sense as a matter of policy. An institutional property holder like a bank or insurance company should not face liability for making a transfer pursuant to the terms of the governing instrument, absent actual knowledge that the transfer has been contested, and should not be liable for declining to transfer property pursuant to a contested instrument, until the court has determined that the transfer is valid.

However, there are two technical problems with the drafting of the provision, which the proposed law would correct:

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96. Prob. Code § 21352.

97. *Id.*



- The reference to a “prohibited” transfer is inaccurate and potentially confusing. The Donative Transfer Restriction Statute does not “prohibit” transfers. It creates a rebuttable presumption of invalidity. The proposed law would not use the term “prohibited.”
- Mere notice of the “possible invalidity” of a transfer under the Donative Transfer Restriction Statute is not a sufficiently clear basis on which to condition third party liability. The proposed law would instead require service of notice that a contest has been filed or that a court has determined the transfer to be valid.

### Degree of Kinship

Two provisions of the Donative Transfer Restriction Statute make reference to a “degree of kinship.”<sup>98</sup> There is no guidance, in the Probate Code or any other California code, as to how to calculate degrees of kinship. This may lead to confusion and inconsistency, both in the provisions at issue in this recommendation as well as the many other statutes that make reference to degrees of kinship or consanguinity.<sup>99</sup>

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98. Prob. Code §§ 21350(b), 21351(g).

99. See, e.g., 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); Health & Safety Code §§ 7100 (disposition of human remains), 7105 (disposition of human remains), , 13113.8 (smoke detector requirements), 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 (guardian or conservator), 2359 (guardian or conservator), 2403 (guardian or conservator), 6402 (intestate succession), 6402.5 (intestate succession); Veh. Code § 13803 (unsafe vehicle operation by family member);

In order to provide guidance on this issue, the proposed law would add general rules of construction to the Probate Code.<sup>100</sup> Those provisions would be consistent with former Probate Code Sections 251-253,<sup>101</sup> which were repealed on the recommendation of the Commission in 1982.<sup>102</sup> At that time, it was felt that the provisions were not necessary for purposes of the law governing wills and intestate succession. Given the other contexts in which degree of kinship is relevant, the Commission now believes that statutory guidance should be provided.

### CONCLUSION

The Donative Transfer Restriction Statute imposes a statutory presumption that certain donative transfers are the product of fraud or undue influence and therefore invalid. Such a presumption is proper in circumstances where the facts indicate a heightened risk of fraud or undue influence. However, if the scope of the presumption is too broad, it could operate to defeat transferor intentions, by invalidating a gift that was not the product of fraud or undue influence.

The Commission's recommendations would adjust the application of the statutory presumption to conform more closely with common law principles governing proof of undue influence. Most significantly:

- A gift to a volunteer care-giver would be removed from the scope of the presumption. Such a gift is not

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Welf. & Inst. Code §§ 319 (dependent children), 361.3 (dependent children), 361.5 (dependent children), 366.21 (dependent children), 366.22 (dependent children), 727.4 (ward of court), 11362 (assistance to children in kinship care), 11400 (assistance to children in foster care).

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

101. See 1931 Cal. Stat. ch. 281.

102. 1983 Cal. Stat. ch. 842, § 19; Tentative Recommendation on *Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301, 2509 (1982).

“unnatural” on its face and therefore does not present the same degree of risk of fraud or undue influence as a gift to a paid care custodian. That would help to avoid the invalidation of gifts that are intentionally made to friends and Good Samaritans. Such gifts could still be challenged under the common law, and if fraud or undue influence is proven, invalidated.

- The definition of “dependent adult” would be changed from a rule that includes all who have disabilities, to instead include only those who are unable to provide for personal needs, manage finances, or resist fraud or undue influence. That would narrow the scope of the presumption to those who have a demonstrated need for protection. It would eliminate an existing burden on the testamentary freedom of all persons with disabilities, many of whom do not require the statute’s protection.
- The presumption would be limited to fraud and undue influence. The existing statute inappropriately creates a presumption of menace and duress, based on facts that do not support such a presumption.

The proposed law would also make a number of minor improvements to the Donative Transfer Restriction Statute, harmonizing inconsistent provisions, conforming the operation of the statute to the general law governing contests based on fraud and undue influence, and making a number of other minor substantive and technical changes.



Contents

PROPOSED LEGISLATION .....143

PART 3.5. PRESUMPTION OF FRAUD OR UNDUE INFLUENCE .....143

    CHAPTER 1. DEFINITIONS .....143

        § 21360. Application of definitions .....143

        § 21362. “Care custodian” .....143

        § 21364. “Cohabitant” .....144

        § 21366. “Dependent adult” .....144

        § 21368. “Domestic partner” .....145

        § 21370. “Independent attorney” .....145

        § 21372. “Interested witness” .....145

        § 21374. “Related by blood or affinity” .....145

    CHAPTER 2. OPERATION AND EFFECT OF PRESUMPTION .....146

        § 21380. Presumption of fraud or undue influence .....146

        § 21382. Exceptions .....148

        § 21384. Attorney certification .....149

        § 21386. Effect of invalid transfer .....150

        § 21388. Liability of third party transferor.....151

        § 21390. Contrary provision in instrument .....151

        § 21392. Application of part .....151

CONFORMING AND TECHNICAL REVISIONS .....152

    Bus. & Prof. Code § 6103.6 (amended). Compensation for  
        trustee services .....152

    Prob. Code § 13 (added). Degree of kinship or consanguinity .....152

    Prob. Code § 2583 (amended). Proposed actions by court .....153

    Prob. Code § 6112 (amended). Witnesses .....155

    Prob. Code § 15642 (amended). Removal of trustee .....156

    Prob. Code § 16062 (amended). Accounting .....159

    Prob. Code § 21310 (amended). Enforcement of no contest  
        clause .....161



## PROPOSED LEGISLATION

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

SEC. \_\_\_\_\_. Part 3.5 (commencing with Section 21350) of Division 11 of the Probate Code is repealed.

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

### **Prob. Code §§ 21360-21392 (added). Presumption of fraud or undue influence**

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

## PART 3.5. PRESUMPTION OF FRAUD OR UNDUE INFLUENCE

### CHAPTER 1. DEFINITIONS

#### **§ 21360. Application of definitions**

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

**Comment.** Section 21360 is new.

#### **§ 21362. “Care custodian”**

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

(b) For the purposes of this section, “health and social services” include, but are not limited to, the administration of medicine, medical testing, wound care, assistance with

hygiene, companionship, housekeeping, shopping, cooking, and assistance with finances.

**Comment.** Section 21362 is similar to the last sentence of former Section 21350(c), with two substantive exceptions: (1) The definition of “care custodian” is now limited to a person who provides services for remuneration, as a profession or occupation, and (2) the definition of “care custodian” does not incorporate the list of persons from Welfare and Institutions Code Section 15610.17.

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

See also Section 56 (“person” defined).

### § 21364. “Cohabitant”

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

**Comment.** Section 21364 continues the second sentence of former Section 21351(a) without substantive change, except that the definition is generalized so that it applies to every use of the term “cohabitant” in this part. Under former law, the definition of “cohabitant” applied to former Section 21351, but not to former Section 21350.

### § 21366. “Dependent adult”

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

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

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

**Comment.** Section 21366 is new. The standard used in this section is drawn from the criteria for appointment of a conservator. See Prob. Code § 1801(a)-(b).

See also Section 45 (“instrument”).



**§ 21368. “Domestic partner”**

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

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

**§ 21370. “Independent attorney”**

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

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

**§ 21372. “Interested witness”**

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

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

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

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

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

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

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

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

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

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

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

Subdivision (a)(3) applies to the spouse or domestic partner of a relative regardless of whether that relative is living or deceased.

See also Section 21368 (“domestic partner”).

## CHAPTER 2. OPERATION AND EFFECT OF PRESUMPTION

### § 21380. Presumption of fraud or undue influence

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

(1) The person who drafted the instrument.

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

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

(4) An interested witness.

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

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

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

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

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

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

(1) Subdivision (a)(3) limits the care custodian presumption to gifts made during the period in which the care custodian provided services to the transferor.

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

(3) Subdivision (a)(7) generalizes the reference to a "law partnership or law corporation" in former Section 21350(a)(3), to include any law firm, regardless of how it is organized.

(4) Subdivision (a)(7) generalizes the rule creating a presumption of fraud or undue influence when a gift is made to the law firm of the drafter of a donative instrument, so that it also applies to a fiduciary of the transferor who transcribes an instrument or causes it to be transcribed.

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

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

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

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

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

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

See also Sections 45 (“instrument”), 21362 (“care custodian”), 21364 (“cohabitant”), 21366 (“dependent adult”), 21368 (“domestic partner”), 21372 (“interested witness”), 21374 (“related by blood or affinity”).

### **§ 21382. Exceptions**

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

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

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

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

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

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

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

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

generalized to include an instrument that is transcribed by an exempt person.

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

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

Subdivision (e) continues former Section 21351(h) without substantive change, except that the \$3,000 amount for a small gift has been increased to \$5,000.

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

See also Sections 45 (“instrument”), 21364 (“cohabitant”), 21374 (“related by blood or affinity”).

#### **§ 21384. Attorney certification**

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

##### **“CERTIFICATE OF INDEPENDENT REVIEW**

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

I am an ‘independent attorney’ as defined in Probate Code Section 21370 and am in a position to advise the transferor independently, impartially, and confidentially as to the consequences of the transfer.

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

---

(Name of Attorney)

(Date)”

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

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

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

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

See also Sections 45 (“instrument”), 21362 (“care custodian”), 21370 (“independent attorney”).

### § 21386. Effect of invalid transfer

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

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

See also Sections 45 (“instrument”), 21368 (“domestic partner”).

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

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

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

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

See also Section 45 (“instrument”).

**§ 21390. Contrary provision in instrument**

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

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

See also Section 45 (“instrument”).

**§ 21392. Application of part**

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

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

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

Subdivision (b) is new. It makes clear that this part supplements and does not supersede the common law governing menace, duress, fraud, and undue influence. 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).

See also Section 45 (“instrument”).

## CONFORMING AND TECHNICAL REVISIONS

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

SEC. \_\_\_\_\_. Section 6103.6 of the Business and Professions Code is amended to read:

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

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

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

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

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

(b) Lineal kinship or consanguinity is the relationship between two persons, one of whom is a direct descendant of the other. The degree of kinship between those persons is



determined by counting the generations separating the first person from the second person. In counting the generations, the first person is excluded and the second person is included. For example, parent and child are related in the first degree of lineal kinship or consanguinity, grandchild and grandparent are related in the second degree, and great-grandchild and great-grandparent are related in the third degree.

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

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

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

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

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

SEC. \_\_\_\_\_. Section 2583 of the Probate Code is amended to read:

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

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

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

(c) The traits of the conservatee.

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

(e) The wishes of the conservatee.

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

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

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

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

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

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

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

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

**Comment.** Section 2583(l) is amended to replace a reference to former Section 21350(b)(1) with the substance of that former provision.

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

SEC. \_\_\_\_\_. Section 6112 of the Probate Code is amended to read:

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

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

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

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

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

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

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

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

SEC. \_\_\_\_\_. Section 15642 of the Probate Code is amended to read:

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

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

- (1) Where the trustee has committed a breach of the trust.
- (2) Where the trustee is insolvent or otherwise unfit to administer the trust.
- (3) Where hostility or lack of cooperation among cotrustees impairs the administration of the trust.
- (4) Where the trustee fails or declines to act.
- (5) Where the trustee's compensation is excessive under the circumstances.
- (6) Where the sole trustee is a person described in subdivision (a) of Section ~~21350~~ 21380, whether or not the person is the transferee of a donative transfer by the transferor, unless, based upon any evidence of the intent of

the settlor and all other facts and circumstances, which shall be made known to the court, the court finds that it is consistent with the settlor's intent that the trustee continue to serve and that this intent was not the product of fraud, ~~menace, duress,~~ or undue influence. Any waiver by the settlor of this provision is against public policy and shall be void. This paragraph shall not apply to instruments that became irrevocable on or before January 1, 1994. This paragraph shall not apply if any of the following conditions are met:

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

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

**"CERTIFICATE OF INDEPENDENT REVIEW**

I, (attorney's name), have reviewed (name of instrument) and have counseled my client, (name of client), fully and privately on the nature and legal effect of the designation as trustee (name of trustee) ~~of~~ contained in that instrument. I am so disassociated from the interest of the person named as trustee as to be in a position to advise my client impartially and confidentially as to the consequences of the designation. On the basis of this counsel, I conclude that the designation of a person who would otherwise be subject to removal under paragraph (6) of subdivision (b) of Section 15642 of the Probate Code is clearly the settlor's intent and that intent is not the product of fraud, ~~menace, duress,~~ or undue influence.

”

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(Name of Attorney)                      (Date)

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

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

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

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

(9) For other good cause.

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


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

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

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

**Comment.** Section 15642(b)(6) is amended to correct a reference to former Section 21350 and to delete a superfluous word in the certificate form.

Subdivisions (b)(6) and (c) are amended to remove references to menace and duress. The references relate to the presumption of menace, duress, fraud, or undue influence that could arise under former Section 21350. Much of the substance of that provision is continued in Section 21380, but Section 21380 does not provide for a presumption of menace or duress. That change in the law makes the references to menace and duress in this section unnecessary.

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

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

SEC. \_\_\_\_\_. Section 16062 of the Probate Code is amended to read:

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

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

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

(d) Except as provided in Section 16064, the duty of a trustee to account pursuant to former Section 1120.1a of the Probate Code (as repealed by Chapter 820 of the Statutes of 1986), under a trust created by a will executed before July 1, 1977, which has been removed from continuing court jurisdiction pursuant to former Section 1120.1a, continues to apply after July 1, 1987. The duty to account under former Section 1120.1a may be satisfied by furnishing an account that satisfies the requirements of Section 16063.

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

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



**Prob. Code § 21310 (amended). Enforcement of no contest clause**

SEC. \_\_\_\_\_. Section 21310 of the Probate Code is amended to read:

21310. As used in this part:

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

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

(1) Forgery.

(2) Lack of due execution.

(3) Lack of capacity.

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

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

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

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

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

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

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

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

**Comment.** Section 21310 is amended to correct a reference to former Section 21350.

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

RECOMMENDATION

## **Attorney-Client Privilege After Client's Death**

February 2009

California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, CA 94303-4739  
[www.clrc.ca.gov](http://www.clrc.ca.gov)

#### NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Attorney-Client Privilege After Client's Death*, 38 Cal. L. Revision Comm'n Reports 163 (2008). This is part of publication #232.

STATE OF CALIFORNIA

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CALIFORNIA LAW REVISION COMMISSION

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HON. JOHN ZEBROWSKI

February 19, 2009

To: The Honorable Arnold Schwarzenegger  
*Governor of California*, and  
The Legislature of California

Properly invoked, the attorney-client privilege prohibits compelled disclosure of a confidential communication between a client and the client's attorney. For example, when the privilege applies, it prevents use of the confidential communication as evidence in court.

The purpose of the privilege is to promote justice by encouraging clients to fully disclose information to their attorneys, without fear that the attorney may be forced to reveal that information. A countervailing consideration is that the privilege's exclusion of evidence may hinder the search for truth.

Under the Evidence Code (Sections 953-954), the attorney-client privilege survives the client's death so long as there is a personal representative, who holds the deceased client's privilege. Accordingly, the privilege survives during administration of the client's estate.

Under case law (*Moeller v. Superior Court*), the attorney-client privilege of a deceased client who was a trustee may

survive so long as there is a successor trustee, who holds the deceased trustee's privilege. Survival of the deceased trustee's privilege extends only to the trustee's attorney-client communications made in a fiduciary capacity relating to administration of the trust.

Chapter 388 of the Statutes of 2007 directs the Law Revision Commission to study the attorney-client privilege after the client's death.

The Commission considered several alternatives to existing law. None appears to be clearly superior to existing law. The Commission believes that existing law strikes a good balance between competing policy considerations.

Accordingly, the Commission recommends preservation of the general approach of existing law, with two minor adjustments. These adjustments would be consistent with the policy determination underlying existing law.

In particular, the Commission's recommendation is to:

- Clarify that an existing exception in Evidence Code Section 957, which applies when all parties claim through the deceased client, applies when one or more of the parties claims under a nonprobate transfer.
- Clarify that the privilege is held by a personal representative who is appointed for purposes of subsequent estate administration pursuant to Probate Code Section 12252.

This recommendation was prepared pursuant to 2007 Cal. Stat. ch. 388, § 2 (AB 403).

Respectfully submitted,

Pamela L. Hemminger  
*Chairperson*

## ACKNOWLEDGMENTS

Comments from knowledgeable persons are invaluable in the Commission's study process. The Commission would like to express its appreciation to the individuals and organizations who have taken the time to share their thoughts with the Commission.

Inclusion of the name of an individual or organization should not be taken as an indication of the individual's opinion or the organization's position on any aspect of this recommendation. The Commission regrets any errors or omissions that may have been made in compiling these acknowledgments.

DAVID W. BAER, *Executive Committee of the State Bar Trusts and Estates Section*

HON. JOSEPH B. HARVEY (RET.), *Susanville*

PAUL GORDON HOFFMAN, *Hoffman Sabban & Watenmaker*

NEIL F. HORTON, *Executive Committee of the State Bar Trusts and Estates Section*

JODIE JENSEN, *El Dorado County District Attorney's Office*

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SUZANNE M. MELLARD, *State Bar Committee on Professional Responsibility and Conduct*

PROF. EILEEN A. SCALLEN, *William Mitchell College of Law*





## ATTORNEY-CLIENT PRIVILEGE AFTER THE CLIENT'S DEATH

Properly invoked, the attorney-client privilege prohibits compelled disclosure of a confidential communication between a client and the client's attorney.<sup>1</sup> For example, when the privilege applies, it prevents use of the confidential communication as evidence in court.<sup>2</sup>

The Legislature directed the Commission to study "whether, and if so, under what circumstances, the attorney-client privilege should survive the death of the client."<sup>3</sup> Under existing law, the privilege has limited duration after the client's death.<sup>4</sup>

This recommendation discusses policies served by the attorney-client privilege, and describes existing law concerning the survival of the privilege after the death of the client. It then sets forth several alternatives to existing law that the Commission considered.

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1. Evid. Code §§ 952, 954. The protection of a confidential communication includes an attorney's "legal opinion formed and the advice given" in the course of the attorney-client relationship. Evid. Code § 952.

2. The attorney-client privilege is not limited to court proceedings, but applies in "any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given." Evid. Code § 901; see also Evid. Code § 910.

It should be noted that when the privilege is inapplicable, the attorney-client communication is not necessarily admissible. Other evidentiary exclusionary rules still apply. See, e.g., Evid. Code § 1200 (hearsay rule).

3. 2007 Cal. Stat. ch. 388, § 2 (AB 403).

4. See Evid. Code §§ 953-954 & Comments; *Moeller v. Superior Court*, 16 Cal. 4th 1124, 1127, 1134, 947 P.2d 279, 69 Cal. Rptr. 2d 317 (1997); see also Prob. Code §§ 15414, 21200-21207 (rules against perpetuities).

The Commission recommends that the general approach of existing law be preserved. The Commission does, however, recommend minor adjustments that are consistent with that general approach.

## POLICIES OF THE ATTORNEY-CLIENT PRIVILEGE

The fundamental purpose of the attorney-client privilege is to encourage clients to fully disclose information to their attorneys, without fear that the attorney may be forced to reveal that information.<sup>5</sup> The privilege seeks to encourage candid communication between clients and their attorneys in

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5. *Fisher v. United States*, 425 U.S. 391, 403 (1976) (“[I]f the client knows that damaging information could more readily be obtained from the attorney following disclosure than from [the client himself or herself] in the absence of disclosure, the client would be reluctant to confide in [the] lawyer ...”); see Evid. Code § 950 Comment; *People v. Meredith*, 29 Cal. 3d 682, 690-91, 631 P.2d 46, 175 Cal. Rptr. 612 (1981); *Dep’t of Pub. Works v. Donovan*, 57 Cal. 2d 346, 354, 369 P.2d 1, 19 Cal. Rptr. 473 (1962); *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 396, 364 P.2d 26, Cal. Rptr. 90 (1961).

The goal of encouraging client candor is also furthered by a related doctrine, the duty of confidentiality. See Bus. & Prof. Code § 6068(e); Rules of Professional Conduct R. 3-100. While the attorney-client privilege protects against *compelled* disclosure, the duty of confidentiality is broader, protecting a client’s secrets from disclosure, even if not compelled. This duty has an unlimited duration after the client’s death. Vapnek *et al*, California Practice Guide: Professional Responsibility, *Confidentiality and Privilege* §§ 7:35-7:36 (2008).

Another doctrine, the work-product privilege, protects certain aspects of the attorney-client relationship. See, e.g., Code Civ. Proc. § 2018.030(a) (protecting, nearly absolutely, discovery of any “writing that reflects an attorney’s impressions, conclusions, opinions, or legal research or theories”); Penal Code § 1054.6 (providing same protection in criminal cases); see also Code Civ. Proc. § 2018.030(b) (providing limited protection to other work product in civil cases). Unlike the attorney-client privilege and duty of confidentiality, the work-product privilege seeks to protect the freedom of attorneys to prepare their cases, rather than to encourage attorney-client communication. See Code Civ. Proc. § 2018.020.

order to promote “broader public interests in the observance of law and the administration of justice.”<sup>6</sup>

The privilege is an exception to the general rules that any witness with knowledge of an issue may be called to testify and that the public has a right to every person's evidence.<sup>7</sup> Thus, a countervailing consideration is that the privilege may hinder the search for truth.<sup>8</sup>

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6. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); see also *Chirac v. Rinaker*, 24 U.S. 280, 294 (1826) (stating that attorney-client privilege “is indispensable for the purposes of private justice”). The complexity of law may make it necessary for a layperson to consult an attorney in order to understand the law, and to vindicate the layperson's rights. 24 C. Wright & K. Graham, *Federal Practice and Procedure* § 5472 (2008). Having citizens informed about the law and having the law administered fairly are in the public interest, which is best realized if both sides have help of counsel. *Id.* “[S]ound legal advice or advocacy serves public ends and ... depends upon the lawyer's being fully informed by the client.” *Upjohn*, 449 U.S. 389. If the attorney's “professional mission is to be carried out,” the attorney must “know all that relates to the client's reasons for seeking representation.” *Id.* The attorney-client privilege is thus “founded upon the necessity, in the interest and administration of justice,” of having attorneys aid laypersons who are “free from the consequences or the apprehension of disclosure.” *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

Some commentators also put forth a non-instrumental rationale, under which the privilege is justified as promoting values, such as privacy, autonomy, client loyalty, or the policy against self-incrimination. See C. Mueller & L. Kirkpatrick, *Evidence* § 5.8, p. 309 (3d ed. 2003); E. Imwinkelried, *The New Wigmore: A Treatise on Evidence Evidentiary Privileges* §§ 5.1.2, 5.3.2, pp. 259, 327 (2002); Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 Cal. L. Rev. 487, 489 (1927-28).

7. See *Evid. Code* § 911; *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (public has right “to every [person's] evidence except for those persons protected by a constitutional, common-law or statutory privilege”); 1 E. Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 11 (5th ed. 2007); Mueller & Kirkpatrick, *supra* note 6, at 285 (stating that privileges “exempt certain testimony, and sometimes certain witnesses, from the scope of compulsory process”).

8. See 1 K. Broun, *McCormick on Evidence*, § 72, pp. 387-88 (6th ed. 2006); Mueller & Kirkpatrick, *supra* note 6, at 285. However, ascertainment of the truth might be more difficult if the attorney-client privilege did not exist. The privilege facilitates legal representation of clients, helping them present their

The privilege is based on a long-standing public policy determination that the aggregate benefit to the justice system justifies the risk that the privilege may result in unjust decisions through suppression of relevant evidence.<sup>9</sup> Because the privilege excludes evidence from the factfinder, however, limits to the privilege have always been recognized.<sup>10</sup>

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cases before the factfinder. “The privilege helps to ensure that the representation will be competent and fully informed.” ABA Task Force on the Attorney-Client Privilege, *Report of the American Bar Association’s Task Force on the Attorney-Client Privilege*, 60 Bus. Law. 1029, 1037 (2005). When a client tells an attorney all the facts, the attorney is best able to ensure that the truth will prevail. See Wright & Graham, *supra* note 6 (stating that privilege, by encouraging open communication between clients and attorneys, helps to prevent erroneous litigation results). Without an attorney-client privilege, meritorious cases may be lost, due to clients’ failures to fully disclose facts that they thought might be harmful. See *id.*; see also *Chirac*, 24 U.S. at 294 (stating that attorney-client privilege “is indispensable for the purposes of private justice”).

It should be noted that the privilege would not apply if its exclusion of evidence would unconstitutionally infringe a person’s right. See Evid. Code §§ 230, 910; see, e.g., *People v. Godlewski*, 17 Cal. App. 4th 940, 945, 21 Cal. Rptr. 2d 796 (1993) (stating that if criminal defendant shows compelling need for disclosure of privileged communication, criminal defendant’s constitutional right to fair trial would mandate overriding attorney-client privilege).

9. *Mitchell v. Superior Court*, 37 Cal. 3d 591, 599-600, 691 P.2d 642, 208 Cal. Rptr. 866 (1984); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D.Mass 1950) (“The social good derived from the proper performance of lawyers acting for their clients ... outweigh[s] the harm that may come from the suppression of the evidence.”); see also *In re The Investigation of the Death of Eric Dewayne Miller and of any Information in the Possession of Attorney Richard T. Gammon Regarding that Death*, 357 N.C. 316, 328, 384 S.E. 2d 772 (2003) (stating that attorney-client privilege’s “protection for confidential communications is one of the oldest and most revered in law”).

10. Hazard, *An Historical Approach to the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061, 1091 (1978). “[C]ourts and legislators naturally try to avoid extravagant applications of the privilege that would block access to information while contributing little to the values and interests at stake.” Mueller & Kirkpatrick, *supra* note 6, at 311; see, e.g., *Fisher*, 425 U.S. at 403 (attorney-client privilege only applies where necessary to achieve its purpose because it often withholds relevant information from factfinder); see also *United States v. Zolin*, 491 U.S. 554, 562 (1989) (recognizing crime-fraud exception because

## CALIFORNIA'S LONG-STANDING APPROACH

### Background

Over fifty years ago, the Legislature directed the Commission to study whether California should adopt the Uniform Rules of Evidence (the "U.R.E.").<sup>11</sup> In response to that directive, the Commission drafted the Evidence Code. The attorney-client privilege after the client's death was one of many topics the Commission considered in its study of the U.R.E.

The Commission recommended the approach in the U.R.E., which provides for posthumous survival of the privilege only when there is a personal representative.<sup>12</sup> The Legislature

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attorney-client privilege "is not without its costs"); *Trammel v. United States*, 445 U.S. 40, 50 (1980) (privileges should be construed "only to the very limited extent that permitting a refusal to testify ... has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth," as liberal application can frustrate justice). However, the privilege does not cause a loss of evidence if the communication would not have been made without the protection of the privilege. See *Wright & Graham*, *supra* note 6; *Mueller & Kirkpatrick*, *supra* note 6, at 287. The United States Supreme Court explains that "the loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place." *Swidler & Berlin v. United States*, 524 U.S. 399, 408 (1998); *Jaffee v. Redmond*, 518 U.S. 1, 12 (1996); *Fisher*, 425 U.S. at 403.

11. 1956 Cal. Stat. res. ch. 42.

12. See *Tentative Recommendation relating to the Uniform Rules of Evidence: Article V. Privileges*, 6 Cal. L. Revision Comm'n Reports 201, 208 (1964); see also *Recommendation proposing an Evidence Code*, 7 Cal. L. Revision Comm'n Reports 1, 173-74 (1965); *Chadbourn, A Study relating to the Privileges Article of the Uniform Rules of Evidence*, 6 Cal. L. Revision Comm'n Reports 301, 389 (1964).

The portion of the U.R.E. that sets forth who may claim the privilege is in Rule 502(c), which states:

(c) Who may claim privilege. The privilege under this rule may be claimed by the client, the client's guardian or conservator, the personal

adopted that approach when it enacted the Evidence Code in 1965.<sup>13</sup>

Twenty-five other states have also adopted an attorney-client privilege based on the U.R.E.<sup>14</sup>

### **Duration of the Attorney-Client Privilege After the Client's Death**

Before the enactment of the Evidence Code, the provision setting forth the attorney-client privilege did not specify its posthumous effect.<sup>15</sup>

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representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. A person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege, but only on behalf of the client.

The full text of Rule 502, which relates to the attorney-client privilege, is available at <[www.law.upenn.edu/bll/archives/ulc/ure/evid1200.htm](http://www.law.upenn.edu/bll/archives/ulc/ure/evid1200.htm)>.

13. See Evid. Code §§ 953-954 & Comments; HLC Properties, Ltd. v. Superior Court, 35 Cal. 4th 54, 65-68, 105 P.3d 560, 24 Cal. Rptr. 3d 199 (2005).

14. Ala. R. Evid. 502 (Alabama); Alaska R. Evid. 503 (Alaska); Ark. R. Evid. 502 (Arkansas); Del. R. Evid. 502 (Delaware); Fla. Stat. Ann. § 90.502 (Florida); Haw. R. Evid. 503 (Hawaii); Idaho R. Evid. 502 (Idaho); Kan. Stat. Ann. § 60-426 (Kansas); Ky. R. Evid. 503 (Kentucky); La. R. Evid. 506 (Louisiana); Me. R. Evid. 502 (Maine); Miss. R. Evid. 502 (Mississippi); Neb. Rev. Stat. § 27-503 (Nebraska); Nev. Rev. Stat. §§ 49.035-49.115 (Nevada); N.H. R. Evid. 502 (New Hampshire); N.J.S.A. 2A:84A-20 (New Jersey); N.M. R. Evid. 11-503 (New Mexico); N.D. R. Evid. 502 (North Dakota); Okla. Stat. Ann. Tit. 13 § 2502 (Oklahoma); Or. Rev. Stat. § 40.225 (Oregon); S.D. Codified Laws §§ 19-13-2-19-13-5 (South Dakota); Tex. R. Evid. 503 (Texas); Utah R. Evid. 504 (Utah); Vt. R. Evid. 502 (Vermont); Wis. Stat. Ann. § 905.03(3) (Wisconsin).

However, the privilege in these states is not universally regarded as ending after the client's estate is closed, as in California. See, e.g., *Swidler*, 524 U.S. at 405 n.2. The drafters of the U.R.E. intended the attorney-client privilege to end after the estate closes and the personal representative is discharged. Chadbourn, *supra* note 12, at 389; see also Wydick, *The Attorney-Client Privilege, Does It Really Have Life Everlasting?*, 87 Ky. L.J. 1165, 1185-87 (1999) (stating that drafters intended to end privilege after estate closes, and reasoning that plain language of U.R.E. requires that result). But it is unclear whether each state legislature that adopted the U.R.E.'s language shared that intent.

Since the Evidence Code went into effect in 1967, the attorney-client privilege survives the client's death so long as there is a personal representative.<sup>16</sup> Accordingly, the privilege survives during administration of the deceased client's estate, and during the resolution of claims by<sup>17</sup> or against<sup>18</sup> the estate.

The reasoning underlying the approach in the Evidence Code is as follows:

Although there is good reason for maintaining the privilege while the estate is being administered — particularly if the estate is involved in litigation — there is

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15. See former Code Civ. Proc. § 1881(2) (1939 Cal. Stat. ch. 129, § 5). It seems probable that the privilege survived indefinitely, and that nobody could waive it. See *Collette v. Sarrasin*, 184 Cal. 283, 289, 193 P. 571 (1920); see also Chadbourn, *supra* note 12, at 389-90 (stating that attorney-client privilege might have survived indefinitely because courts had determined that physician-patient privilege and marital privilege survived indefinitely).

16. See 1965 Cal. Stat. ch. 299, § 2, operative Jan. 1, 1967; Evid. Code §§ 953-954 & Comments; *HLC Properties*, 35 Cal. 4th at 65-68. Provisions pertaining to who is personal representative are set forth in the Probate Code. See, e.g., Prob. Code §§ 58(a) ("‘Personal representative’ means executor, administrator, administrator with the will annexed, special administrator, successor personal representative, public administrator acting pursuant to Section 7660, or a person who performs substantially the same function under the law of another jurisdiction governing the person's status."), 8420 (providing that person named in will has right to appointment as personal representative), 8461 (setting forth priority of appointment where decedent dies without will). Note, however, that when the deceased client was a trustee, the deceased trustee's privilege appears to survive so long as there is a successor trustee (who holds the predecessor trustee's privilege), but only as to communications relating to trust administration. See discussion of "Limited Expansion by *Moeller v. Superior Court*" *infra*.

17. See Code Civ. Proc. §§ 377.30 (providing that personal representative, or if none, successor in interest, may *commence* surviving action), 377.31 (providing for personal representative, or if none, successor in interest, to *continue* action brought by decedent).

18. See Prob. Code § 9000 et seq. (claims against estate); see also Code Civ. Proc. § 377.40 (subject to Probate Code Section 9000 et seq., surviving action against decedent may be asserted against personal representative, or to extent provided by statute, successor in interest).

little reason to preserve secrecy at the expense of excluding relevant evidence after the estate is wound up and the personal representative is discharged.<sup>19</sup>

The duration of the privilege in the Evidence Code rests on two key policy determinations. First, it reflects a conclusion that attorney-client communication would be chilled significantly if the privilege ended *before* a personal representative has completed his or her duties as personal representative, such as administration of the estate of the deceased person (the decedent).<sup>20</sup> Second, it reflects a conclusion that attorney-client communication would *not* be chilled significantly if the privilege ended *after* the personal representative has completed his or her duties.<sup>21</sup>

Two other privileges based on a confidential relationship — the physician-patient and psychotherapist-patient privileges — have the same limited posthumous effect as the attorney-client privilege.<sup>22</sup> All the other privileges in the Evidence

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19. Evid. Code § 954 Comment.

20. See *id.* A personal representative may also have duties to perform when there is no estate. For example, a successor in interest may be appointed special administrator (a type of personal representative) in prosecuting a surviving claim where there is no estate open. See Code Civ. Proc. §§ 377.30 (providing that successor in interest may *commence* surviving action if there is no personal representative), 377.31 (providing for successor in interest to *continue* surviving action if there is no personal representative), 377.33 (providing that successor in interest who commences or continues surviving action under Code of Civil Procedure Sections 377.30 or 377.31 may be appointed special administrator) & Comment (stating that appointment of special administrator is authorized because “there may be a need to impose fiduciary duties on the successor to protect the interests of other potential beneficiaries”); see also Prob. Code § 58 (personal representative includes special administrator).

21. See Evid. Code § 954 Comment. The approach presumes that disclosures that would only impact an interest *other than a property interest* (e.g., the decedent’s interest in reputation) would not significantly chill attorney-client communication.

22. See Evid. Code §§ 993-994 (physician-patient privilege), 1013-1014 (psychotherapist-patient privilege); see also *Rittenhouse v. Superior Court*, 235



Code that are based upon a confidential relationship also have a limited posthumous duration, if any at all.<sup>23</sup>

### **Holder of the Decedent's Privilege**

Under the Evidence Code, the personal representative holds the privilege of a deceased client.<sup>24</sup> Although the Evidence Code permits the personal representative to exercise the

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Cal. App. 3d 1584, 1588 n.2, 1 Cal. Rptr. 2d 595 (1991); *Boling v. Superior Court*, 105 Cal. App. 3d 430, 440, 164 Cal. Rptr. 432 (1980). The rationale for the posthumous scope of these privileges is the same as the rationale for the posthumous scope of the attorney-client privilege:

Sections 993 and 994 enable the personal representative to protect the interest of the patient's estate in the confidentiality of these statements and to waive the privilege when the estate would benefit by waiver. When the patient's estate has no interest in preserving confidentiality, or when the estate has been distributed and the representative discharged, the importance of providing complete access to information relevant to a particular proceeding should prevail over whatever remaining interest the decedent may have had in secrecy.

Evid. Code § 993 Comment.

23. See, e.g., Evid. Code §§ 980 & Comment (providing that privilege for confidential marital communication, after a spouse's death, can only be claimed on behalf of surviving spouse), 1034 & Comment (providing that clergy-penitent privilege grants clergy member discretion over whether to disclose penitent's confidential communication both during penitent's life and after penitent's death). Three more privileges based on a confidential relationship were enacted, without Commission involvement, after the adoption of the Evidence Code. See Evid. Code §§ 1035-1036.2 (sexual assault counselor-victim privilege), 1037-1037.8 (domestic violence counselor-victim privilege), 1038-1038.2 (human trafficking caseworker-victim privilege). Of these, the domestic violence counselor-victim privilege and the human trafficking caseworker-victim privilege end outright on the victim's death. See Evid. Code §§ 1037.4, 1037.5, 1038(a), 1038.2(d). The sexual assault counselor-victim privilege survives posthumously so long as there is a personal representative. See Evid. Code §§ 1035.6, 1035.8. However, in a criminal proceeding, or proceeding related to child abuse, the sexual assault counselor-victim privilege is subject to a balancing test. See Evid. Code § 1035.4 (court may override privilege if probative value outweighs effect compelled disclosure would have on victim, or treatment relationship and services).

24. Evid. Code § 953(c). Provisions relating to who is appointed personal representative are cited in note 16 *supra*.

decedent's privilege without qualification,<sup>25</sup> the personal representative has a fiduciary duty to the estate.<sup>26</sup> Thus, a client may be assured that a personal representative will not exercise the posthumous privilege in a manner that could harm the decedent's estate, and thereby, hurt the beneficiaries.<sup>27</sup>

### **Exceptions to the Attorney-Client Privilege After the Client's Death**

There are several exceptions to the attorney-client privilege.<sup>28</sup> A number of these exceptions apply specifically after the client's death. In particular, one exception provides that the privilege does not apply "to a communication relevant to an issue between parties all of whom claim through a deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction."<sup>29</sup> Other exceptions provide that the privilege

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25. See Evid. Code §§ 953-954; *cf. Rittenhouse*, 235 Cal. App. 3d at 1588, 1590 (stating that physician-patient privilege, which tracks attorney-client privilege, places no restrictions on personal representative's right to claim or waive, and grants same right to do so as any other holder of physician-patient privilege).

26. See 24 Cal. Jur. 3d *Decedents' Estates* § 423 (2008) (discussing personal representative's duty to estate).

27. See *id.*

28. See, e.g., Evid. Code §§ 956 (attorney's services used to commit crime or fraud), 956.6 (attorney believes disclosure is reasonably necessary to prevent criminal act likely to cause death or serious harm), 958 (issue relating to breach by client or attorney of duty arising from attorney-client relationship), 959 (issue concerning client's competence or intent, or execution or attestation of document of which attorney was attesting witness), 962 (dispute among former joint clients); see also *People v. Meredith*, 29 Cal. 3d 682, 690-91 & n.8, 631 P.2d 46, 175 Cal. Rptr. 612 (1981) (stating that if "counsel chooses to remove evidence to examine or test it, the original location and condition of that evidence loses the protection of the privilege," but that "the prosecution should present the information in a manner which avoids revealing the content of attorney-client communications or the original source of the information").

29. Evid. Code § 957.

does not apply to a communication if it is relevant to an issue concerning the validity or intended meaning of a deceased client's writing purporting to affect a property interest.<sup>30</sup>

These exceptions seek to permit disclosures that a deceased client presumably would have wanted, to help ensure that the client's property is transferred as intended.<sup>31</sup> Because clients presumably would want such disclosures, there seems to be a diminished danger that these exceptions would interfere with the goal of encouraging candid attorney-client communication. Due to that diminished danger, disclosure of a communication pursuant to one of these exceptions would appropriately give expression to the public's interest in having the evidence before the factfinder.<sup>32</sup>

### **Scope of the Attorney-Client Privilege After the Client's Death**

The exceptions that specifically apply after a client's death, combined with the rule that the privilege only survives so long as there is a personal representative, result in a privilege with limited application after the client's death. Unless the issue relates to the validity or intended meaning of a client's writing that purports to affect a property interest,<sup>33</sup> the privilege applies after the client's death only in a few types of cases, including:

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30. Evid. Code §§ 960-961.

31. See Evid. Code §§ 957, 960-961 Comments.

32. Without these exceptions, it would seem to be much harder for the factfinder to decide correctly an issue relating to the intent or validity of a client's writing transferring property. The evidence contained in the communication relevant to the decedent's wishes may not be available from any other source. Testimony by the client, who is deceased, is not available.

33. *Cf.* Evid. Code §§ 960-961.

- (1) A case between a personal representative of a client's estate and a third party (i.e., a person who does not claim through the client).<sup>34</sup>
- (2) A case between third parties that arises while the client's estate is open.<sup>35</sup>
- (3) A case that arises when an estate is not open, but that involves a claim prosecuted by a decedent's successor in interest, who is appointed special administrator (a type of personal representative).<sup>36</sup>

Although the privilege is applicable to these cases, the personal representative, as holder of the privilege, may waive it.<sup>37</sup>

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34. For example, this could include a claim against the estate by a creditor of the decedent (Prob. Code §§ 9000-9399), a surviving action against a decedent that is asserted against a personal representative (Code Civ. Proc. § 377.40), a surviving action that is commenced or continued by a personal representative (Code Civ. Proc. §§ 377.30, 377.31), or a wrongful death action asserted by the personal representative (Code Civ. Proc. § 377.60). *Cf.* Evid. Code § 957 (providing exception for issue disputed between parties who all claim through decedent).

35. This could be a criminal case or a civil case in which the estate is not a party.

36. See Code Civ. Proc. §§ 377.30 (providing that successor in interest may *commence* surviving action if there is no personal representative), 377.31 (providing for successor in interest to *continue* surviving action if there is no personal representative), 377.33 (providing that successor in interest commencing or continuing claim under Code of Civil Procedure Section 377.30 or 377.31 may be appointed special administrator); see also Prob. Code § 58 (personal representative includes special administrator); *cf.* *Rittenhouse v. Superior Court*, 235 Cal. App. 3d 1584, 1588-89, 1 Cal. Rptr. 2d 595 (1991) (special administrator, as personal representative, holds decedent's physician-patient privilege).

37. See Evid. Code § 953(c) & Comment (stating that personal representative "may either claim or waive the privilege on behalf of the deceased client"); see also Evid. Code § 912 (providing that only a holder of a privilege may waive it); *cf.* *Rittenhouse*, 235 Cal. App. 3d at 1587-89 (holding that personal representative has same right to waive physician-patient privilege as any other holder of that privilege).

## RECENT AMENDMENTS TO PROBATE CODE SECTION 12252

In 2007, amendments to Probate Code Section 12252 were made relating to the posthumous attorney-client privilege.<sup>38</sup> Section 12252 relates to reappointment of a personal representative. The amendments may be subject to two different interpretations.

One interpretation would expand the attorney-client privilege after the client's death by requiring a court to reappoint a personal representative solely to hold the privilege, even when there is no estate to administer. However, this interpretation appears to be at odds with legislative intent.<sup>39</sup>

Another interpretation is that the amendments merely clarify that a personal representative who is appointed to perform subsequent estate administration (estate administration that occurs after the original estate administration has ended, as when a new asset is discovered) holds the deceased client's privilege. The legislative history

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38. See 2007 Cal. Stat. ch. 388, § 1 (AB 403). These amendments were enacted by the same bill that assigned the Commission this study. See 2007 Cal. Stat. ch. 388, § 2 (AB 403).

39. Under this interpretation, the effect of the amendment would permit indefinite survival of the privilege, a significant change from existing law, which was expressly rejected by a legislative committee. See Senate Committee on Judiciary Analysis of AB 403 (June 26, 2007), p. 6.

Further, if the intended effect had been to permit a personal representative to hold the privilege when there is no estate to administer, it would be odd to use Probate Code Section 12252 to make that change in the law. Located in Section 12252, any expansion of the privilege would be limited to circumstances in which a personal representative had previously been discharged. See Prob. Code § 12252 (relating to reappointment of a personal representative).

of the bill provides stronger support for this interpretation than for the first interpretation.<sup>40</sup>

LIMITED EXPANSION BY *MOELLER V.*  
*SUPERIOR COURT*

A California Supreme Court decision appears to affect the duration of the posthumous attorney-client privilege when the deceased client was a trustee. In *Moeller v. Superior Court*, the Court held that a successor trustee is holder of the predecessor trustee's attorney-client privilege, but only as to communications made in a fiduciary capacity that relate to trust administration.<sup>41</sup> Although *Moeller* did not involve a deceased trustee, the principle of the case would seem to apply even if the predecessor trustee were deceased. Accordingly, it appears that a deceased trustee's attorney-client communication relating to trust administration may remain privileged after death, via a successor trustee.

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40. See Assembly Floor Analysis of AB 403 (Aug. 29, 2007), p. 1; Senate Committee on Judiciary Analysis of AB 403 (June 26, 2007), p. 6.

41. *Moeller v. Superior Court*, 16 Cal. 4th 1124, 1127, 1131, 1134, 947 P.2d 279, 69 Cal. Rptr. 2d 317 (1997). *Moeller* did *not* affect the privilege as to a natural person seeking advice in a personal capacity. See *Borissoff v. Taylor & Faust*, 33 Cal. 4th 523, 533-34, 93 P.3d 337, 15 Cal. Rptr. 3d 735 (2004) (citing *Moeller* and stating that "successor fiduciary does *not* become the holder of the privilege for confidential communications that occurred when a predecessor fiduciary in his or her *personal capacity* sought an attorney's advice." (emphasis in original)).

## ALTERNATIVES CONSIDERED IN THIS STUDY

In this study, the Commission considered several alternatives to existing law. The alternatives that were considered are discussed below.<sup>42</sup>

### **Expand Privilege To Survive Until Nonprobate Assets Definitively Pass to Beneficiaries**

Under the Evidence Code, the attorney-client privilege survives the client's death only when there is a personal representative. That will most often be when the deceased client's property passes by will, which generally requires probate administration.<sup>43</sup>

When the Evidence Code was enacted, the main estate planning instrument was a will. Since then, there has been a "nonprobate revolution." Trusts and other nonprobate transfer mechanisms are now often used to transfer property at death outside of probate.

In light of this change in estate planning practice, the Commission considered expanding the privilege to survive in the nonprobate context, regardless of whether property passes through probate (i.e., regardless of whether there is a personal

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42. The Commission also considered new exceptions that would specifically apply after the client's death, including the following:

- An exception for criminal cases.
- An exception if there was a probable conspiracy involving the deceased client, and if disclosure of the communication is necessary to resolve investigation of the conspiracy.
- An exception if a client's suicide causes a knowing destruction of evidence that otherwise could have been available.
- An exception for a communication relating solely to third parties.

The Commission does not propose any of these exceptions. Some would add unpredictability, while others would seem to chill the very communication sought to be disclosed by the exception.

43. An example of an exception, in which a will might not require probate, is administration of a small estate. See Prob. Code §§ 13000-13210.

representative). That would be consistent with the policy determination underlying existing law — i.e., that the privilege should survive until a deceased client's property definitively passes to beneficiaries.

However, the manner in which property passing by various nonprobate devices might be subject to surviving adverse claims is unclear.<sup>44</sup> There is no uniform treatment of creditor claims against nonprobate assets. Accordingly, it would be difficult to specify the types of cases in which the privilege should apply.<sup>45</sup> Other obstacles to expanding the privilege to apply beyond the context of probate administration are discussed below.

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44. This area of the law warrants clarification. A background study on rights of creditors against property transferred by a nonprobate mechanism is being prepared for the Commission. See <[www.clrc.ca.gov/Mreports-bkstudies.html](http://www.clrc.ca.gov/Mreports-bkstudies.html)>.

45. The Commission considered crafting a provision that would make the privilege apply after the client's death only in cases involving surviving claims by or against a decedent or decedent's property. See Code Civ. Proc. §§ 377.20 (stating that unless otherwise provided, cause of action survives death), 377.10-377.62 (prescribing effect of death in civil actions). However, that would allow disclosure in a claim between third parties (where the privilege would not apply), even though a claim could be pending against a decedent's property (where the privilege would apply). The litigant against the decedent's property could learn of the communication disclosed in the claim between third parties. The litigant against the decedent's property could not use it as evidence, but knowing the content of the communication could help the litigant be successful in the claim against the decedent's property. That possibility might deter client candor, undermining the purpose of the privilege. To minimize that risk, disclosure in a claim between third parties could occur in closed court, with that portion of the record sealed. However, this would add complexity, might not be fully effective, and would increase litigation expenses and consumption of judicial resources.

The Commission alternatively considered specifying a set time period in which the privilege would survive after the client's death. The time period would end when no action could impact a deceased client's assets before they definitively pass to beneficiaries. Formulating an accurate time period (neither too short nor too long), however, would be difficult to do.



*Holder of the Decedent's Privilege*

If the privilege were expanded to apply in the nonprobate context, regardless of whether there is a personal representative, it is unclear who should hold the decedent's privilege.<sup>46</sup>

It would be important to identify the privilege holder so that it would be clear when a decedent's attorney-client communication may be excluded.<sup>47</sup>

It would also be important to designate a holder of the decedent's privilege so that it could be waived.<sup>48</sup> If no one could waive the decedent's privilege, the privilege would have stronger force than it does during a client's life, when the client can waive. A living client who refuses to waive is still available as a source of information and may be called as a witness. After the client's death, if no one has authority to waive the privilege, it might be impossible for the factfinder to obtain relevant information contained in a decedent's attorney-client communication.

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46. The person representing the decedent's interest (who is not a personal representative) could be designated the decedent's privilege holder. But this would be difficult to implement without a clear picture of the manner in which an adverse claim might affect property that passes by nonprobate transfer.

Also, it is not clear how a new holder of the decedent's privilege could be properly integrated into existing law. There could be different individuals representing a decedent's interest (who would thus each hold the decedent's privilege) in different actions. It is unclear what should happen if one holder asserted the privilege, but the other holder waived it. Current law provides that waiver by a joint holder does not impact another joint holder's right to claim the privilege. Evid. Code § 912(b). But it is unclear whether the potentially numerous holders of a deceased client's privilege (who would hold because the person is representing a decedent's interest) would be considered joint privilege holders.

47. See Evid. Code §§ 916, 954.

48. See Evid. Code § 912.

### ***Duty Governing the Holder's Exercise of the Decedent's Privilege***

If the privilege were expanded to the nonprobate context, regardless of whether there is a personal representative, it would be necessary to determine what duty would govern the holder's exercise of the privilege. In the absence of a personal representative's fiduciary duty to the decedent's estate, it is unclear what duty would apply. Without a clear duty, the privilege might be exercised in a manner that does not further the purpose of continuing the privilege.

### ***Survival of Privileged Communications Relating to Trust Administration***

Under case law, the privilege already appears to survive the client's death with respect to communications that relate to trust administration.<sup>49</sup> The revocable living trust<sup>50</sup> is the main alternative to a will. Therefore, when a revocable living trust is used instead of a will, the protection of privileged communications under existing law may sometimes be adequate.<sup>51</sup>

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49. See discussion of "Limited Expansion by *Moeller v. Superior Court*" *supra*.

50. The creator of a revocable living trust, the settlor, places the settlor's property into a revocable trust, with the settlor as trustee. See Prob. Code § 15200(a). When the settlor dies, the successor trustee distributes the trust property to the beneficiaries.

51. Existing law apparently would not protect against compelled disclosure of a communication by a settlor if the communication does not relate to trust administration (e.g., the communication relates to property *before* it was placed into a trust, or relates to a subject that is entirely unrelated to the trust). See *Borissoff v. Taylor & Faust*, 33 Cal. 4th 523, 533-34, 93 P.3d 337, 15 Cal. Rptr. 3d 735 (2004) (stating that "successor fiduciary does *not* become the holder of the privilege for confidential communications that occurred when a predecessor fiduciary in his or her *personal capacity* sought an attorney's advice" (emphasis in original)); *Moeller v. Superior Court*, 16 Cal. 4th 1124, 1134, 947 P.2d 279, 69 Cal. Rptr. 2d 317 (1997) ("[T]he successor trustee inherits the power to assert the privilege only as to those confidential communications that occurred when

### ***Conclusion***

Survival of the privilege in the nonprobate context would be consistent with the general policy determination underlying existing law. That is, the privilege would survive until a deceased client's property definitively passes to beneficiaries.<sup>52</sup> However, to implement this alternative, several obstacles would need to be resolved. The Commission believes that any attempt to do so would be premature, until California has a more comprehensive treatment of creditor rights with respect to nonprobate assets.<sup>53</sup>

### **Indefinite Survival**

Another alternative to existing law is indefinite survival of the privilege. That approach is discussed below.

### ***Other Jurisdictions***

Under federal common law, the attorney-client privilege lasts beyond the context of probate administration, and presumably never ends.<sup>54</sup> In twenty-four states, the attorney-client privilege is governed by common law.<sup>55</sup> It is unclear

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the predecessor, *in its fiduciary capacity*, sought the attorney's advice *for guidance in administering the trust.*") (emphasis in original).

As to a communication that remains privileged, the trustee's duties to the trust would presumably govern the trustee's exercise of the posthumous privilege. A trustee has a fiduciary duty, among other things, to preserve trust property and administer the trust in the interest of the beneficiaries. See Prob. Code § 16002(a); *Atascadero v. Merrill Lynch et al*, 68 Cal. App. 4th 445, 462, 80 Cal. Rptr. 2d 329 (1998). If a trustee breaches a duty, it appears that there are enforcement mechanisms in place. See, e.g., Prob. Code § 16420(a)(5) (removal for breach of trust); see also Prob. Code § 16420 (providing other remedies for breach of trust).

52. See Evid. Code § 954 Comment.

53. See *supra* note 44.

54. See *Swidler & Berlin v. United States*, 524 U.S. 399 (1998).

55. The states that have an attorney-client privilege governed by common law are: Arizona, Colorado, Connecticut, Georgia, Illinois, Indiana, Iowa, Maryland,

how many of these states have a privilege that survives indefinitely.<sup>56</sup>

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Massachusetts, Michigan, Minnesota, Missouri, Montana, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, Washington, West Virginia, and Wyoming. See Wydick, *supra*, note 14, at 1181 n.88. Apparently, fifteen of these states have adopted rules based on the U.R.E., but not for the attorney-client privilege. Those fifteen states are Arizona, Colorado, Indiana, Iowa, Michigan, Minnesota, Montana, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, Washington, West Virginia, and Wyoming. See Legal Information Institute of Cornell University of Law, available at <[www.law.cornell.edu/uniform/evidence.html](http://www.law.cornell.edu/uniform/evidence.html)> (listing states that have adopted the U.R.E.).

56. Several of these states have addressed survival of the privilege after the client's death, but only in the context of estate administration. See, e.g., *Wesp v. Everson*, 33 P.3d 191, 200 (Colo. 2001); *Curato v. Brain*, 715 A.2d 631, 636 (R.I. 1998); *Spence v. Hamm*, 226 Ga. App. 357, 358, 487 S.E.2d 9 (Ga. App. 1997); *McCaffrey v. Estate of Brennan*, 533 S.W.2d 264, 267 (Mo. App. 1976); *Taylor v. Sheldon*, 172 Ohio St. 118, 173 N.E.2d 892, 15 O.O.2d 206 (Ohio 1961); see also *Bailey v. Chi., Burlington & Quincy R.R. Co.*, 179 N.W.2d 560, 564 (Iowa 1970) (administrator's action for wrongful death). This adds little, if any, insight into whether the privilege survives death indefinitely, because even in states that reject indefinite survival, the privilege survives during estate administration. Therefore, survival in these states may be no broader than survival under California's Evidence Code.

However, several common law states have determined that the privilege survives beyond the context of estate administration. See, e.g., *In re The Investigation of the Death of Eric Dewayne Miller and of any Information in the Possession of Attorney Richard T. Gammon Regarding that Death*, 357 N.C. 316, 323, 384 S.E. 2d 772 (2003); *Mayberry v. Indiana*, 670 N.E.2d 1262, 1265, 1267 (Ind. 1996); *In re John Doe Grand Jury Investigation*, 408 Mass. 480, 562 N.E. 2d 69, 59 USLW 2329 (Mass. 1990); *State v. Doster*, 276 S.C. 647, 650-51, 653, 284 S.E.2d 218 (S.C. 1981); *State v. Macumber*, 112 Ariz. 569, 571, 544 P.2d 1084 (Ariz. 1976); see also *People v. Vespucci*, 192 Misc. 2d. 685, 692-93, 695, 745 N.Y.S. 2d 391 (N.Y. Co. Ct. 2002) (not determining whether posthumous privilege is subject to "absolute" or "balancing test" doctrine, but that statements at issue remain privileged under both); *Cohen v. Jenkintown Cab Co.*, 238 Pa. Super. 456, 461-64, 357 A.2d 689 (Pa. Super. Ct. 1976) (holding that privilege survives in circumstances where there was no estate, but applying balancing test and overriding privilege). But these states should not be used as a basis for a determination that *all* common law states have an indefinite privilege. In at least one common law state, the state's highest court determined that the

### *Pros and Cons*

Indefinite survival would broaden the privilege to survive even when there is no personal representative. That would have an advantage of making the posthumous privilege apply until a decedent's assets definitively pass to beneficiaries, regardless of whether a decedent's property passes inside or outside of probate.

However, indefinite survival might also result in the privilege surviving in instances beyond those necessary to achieve the goal of encouraging client candor.<sup>57</sup>

Indefinite survival of the posthumous privilege would assure clients that the protection of attorney-client communications against compelled disclosure would last forever.

However, while a client might prefer indefinite protection against compelled disclosure so that the client's communications are never disclosed, from a policy perspective, the issue is whether indefinite survival of the privilege is required for client candor. If most clients would communicate effectively with counsel under existing law, indefinite survival of the posthumous privilege would unnecessarily exclude relevant evidence from the factfinder. This exclusion would have greater effect than the exclusion of evidence during a client's life, when the client can be deposed as a witness.

Finally, if the privilege were to be expanded indefinitely, the same difficulties relating to who would hold the privilege

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privilege did not apply beyond the context of estate administration. See, e.g., *State v. Kump*, 76 Wyo. 273, 278, 291, 301 P.2d 808 (Wyo. 1956).

57. An indefinite privilege would preclude testimony to an attorney-client communication long after the decedent's property interests have been settled. For a description of the policy determination underlying existing law, see discussion of "Duration of the Attorney-Client Privilege After the Client's Death" *supra*.

and relating to the duty that would govern the exercise of the privilege, would arise.<sup>58</sup>

### **Conclusion**

The Legislature determined when it adopted the Evidence Code, that “there is little reason to continue the privilege” after a client’s property is distributed.<sup>59</sup>

There is no evidence that California’s long-standing approach to the posthumous attorney-client privilege is deterring attorney-client communications.<sup>60</sup> Expanding the privilege to survive indefinitely would thus likely exclude more evidence than necessary to achieve the purpose of the privilege, unnecessarily interfering with the public’s right to every person’s evidence and hindering the truth-seeking function of courts.

### **Balancing Competing Interests After the Client’s Death**

The Commission also considered a balancing approach to the attorney-client privilege after the client’s death. Under a

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58. See discussions of “Holder of the Decedent’s Privilege” and “Duty Governing Exercise of the Decedent’s Privilege” *infra*. Jurisdictions with survival beyond the context of estate administration vary in whether the posthumous privilege may be waived, and if so, by whom. See 67 A.L.R. 2d 1268 §§ 2-5 (1959 & Cum. Supp.); see, e.g., *Tucker v. Honda of S.C. Mfg., Inc.*, 354 S.C. 574, 577, 582 S.E.2d 405 (2003) (stating that privilege can only be waived by client); *Macumber*, 119 Ariz. at 520 (noting that waiver occurred by deceased client’s mother at proceedings on remand); see also Epstein, *supra* note 7, at 27 (noting that few cases discuss who may waive privilege after client’s death, and that reasoning is sparse by courts that indicate certain relatives may waive).

59. See Evid. Code § 954 Comment.

60. It seems that most clients would be more concerned about receiving accurate advice by providing full information to their attorneys than about a remote possibility that communications with counsel could be disclosed under compulsion after the client’s death. See Greenberg, Comment, *Swidler & Berlin v. United States ... and Justice for All?*, 80 B.U. L. Rev. 939, 946-47 (2000).

balancing approach, the privilege survives the client's death beyond estate administration, but becomes subject to balancing by a court on a case-by-case basis. Under this approach, the court balances the evidentiary need for disclosure of the attorney-client communication against the decedent's continued interest in confidentiality. The balancing approach could be used for all cases, or be limited to certain types of cases.<sup>61</sup>

### *Other Jurisdictions*

A small number of states employ balancing.<sup>62</sup>

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61. For example, the dissent in *Swidler & Berlin v. United States* advocates balancing in criminal cases after the client's death. See 524 U.S. 399, 411 (1998) (O'Connor, J., dissenting). Another example is the Restatement approach, which advocates balancing after the client's death if the issue is of pivotal significance. Restatement (Third) of the Law Governing Lawyers § 77 Comment d (2000).

62. An appellate court in one state applied a balancing approach after the client's death beyond the context of estate administration. See, e.g., *Cohen v. Jenkintown Cab Co.*, 238 Pa. Super. 456, 462-65, 357 A.2d 689 (Pa. Super. Ct. 1976) (overriding deceased taxi driver's privilege in claim against taxi company by pedestrian injured in hit-and-run accident). In a few jurisdictions, courts have applied a balancing test to determine whether the privilege applies during the client's life. It seems probable that courts in these jurisdictions would apply the same test after the client's death. These jurisdictions are:

- **New Jersey.** *In re Joseph L. Nackson, Esq., Charged with Contempt of Court*, 114 N.J. 527, 537, 555 A.2d 1101 (N.J. 1989) (stating that attorney-client privilege "must in some circumstances yield to the higher demands of order," and that privilege can be pierced by showing need for evidence where information sought could not be obtained by less intrusive means).
- **New York.** *In re Grand Jury Investigation*, 175 Misc. 2d. 398, 401-02, 669 N.Y.S. 2d 179 (N.Y. Co. Ct. 1998) ("[E]ven where the technical requirements of the [attorney-client] privilege are satisfied, it may, nonetheless, yield in a proper case, where strong public policy requires disclosure."); see, e.g., *In re Jacqueline F.*, 47 N.Y. 2d 215, 221-23, 391 N.E. 2d 967, 417 N.Y.S. 2d 884 (N.Y. 1979) (holding that attorney-client privilege yields and attorney must disclose client's address, because non-disclosure would frustrate court's judgment in child's best interests); but see *People*

### *Pros and Cons*

The appeal of balancing is that it allows a court to determine whether an evidentiary need for an attorney-client communication justifies overriding the privilege. It allows the scope of the privilege to be tailored to reflect competing interests on a case-by-case basis.

However, because balancing permits a court to override the privilege based on a need for the evidence, it provides clients little certainty over whether a particular communication would be protected by the privilege. That could undermine the privilege's purpose of encouraging client candor.<sup>63</sup>

Additionally, this approach presents the same implementation difficulties, discussed above, with respect to who would hold the privilege, and what duty, if any, would govern the holder's exercise of the privilege.<sup>64</sup>

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v. Vespucci, 192 Misc. 2d 685, 692-93, 695, 745 N.Y.S. 2d 391 (N.Y. Co. Ct. 2002) (stating that some New York courts apply balancing test to attorney-client privilege claims, but others do not, and holding that deceased client's communications remain privileged under either "absolute" or "balancing test" doctrine without determining which doctrine governs posthumous privilege).

- **Washington.** Amoss v. Univ. of Washington, 40 Wash. App. 666, 687-88, 700 P.2d 350, 25 Ed. Law Rep. 618 (Wash. Ct. App. 1985) (upholding trial court's balancing of evidentiary need for disclosure of attorney-client communication versus need to preserve attorney-client confidentiality).

63. As the United States Supreme Court has repeatedly stressed, the goal of encouraging attorney-client communication requires that the privilege be predictable in its application. See, e.g., *Swidler*, 524 U.S. at 408-09; *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996); *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.")

64. See discussions of "Holder of the Decedent's Privilege" and "Duty Governing Exercise of the Decedent's Privilege" *infra*.



### ***Conclusion***

A balancing approach would permit a court to weigh, after the fact on a case-by-case basis, the decedent's remaining interest in confidentiality against the evidentiary need for the communication. Due to the unpredictability of this type of approach, it appears preferable to strike a balance between policy considerations in advance by clearly delineating the privilege and its exceptions.

### **End Privilege Outright at Client's Death**

A final alternative to existing law would be simply to end the attorney-client privilege upon the client's death.

### ***Other Jurisdictions***

It appears that no state takes this approach.<sup>65</sup>

### ***Pros and Cons***

Proponents of this approach believe that ending the privilege outright at death would not significantly deter clients from openly communicating with their attorneys. Proponents of this approach believe that clients might want disclosure of their attorney-client communications.<sup>66</sup>

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65. See Wydick, *supra*, note 14, at 1180 (stating that his research revealed this approach is not adopted by any state, nor by England). However, a few eminent scholars have supported this approach. Such scholars include Judge Learned Hand and Professors Morgan and McCormick. *Id.*; see also Chadbourn, *supra*, note 12, at 389.

66. Professor McCormick, a proponent of this approach, explained as follows:

The attorney's offered testimony would seem to be of more than average reliability. If such testimony supporting the claim is true, presumably the deceased would have wanted to promote, rather than obstruct, the success of the claim. It would only be a short step forward for the courts to apply here the notion that the privilege is "personal" to the client, and to hold that in all cases death terminates the privilege. This

However, it is not clear that a decedent would want to promote a claim that is adverse to the interests of the decedent's beneficiaries.

Moreover, existing exceptions already make the privilege inapplicable when a deceased client presumably would have wanted his or her attorney-client communications disclosed (when parties all claim through the deceased client,<sup>67</sup> and when an issue concerns the validity or intended meaning of a decedent's writing that purports to affect a property interest<sup>68</sup>).

### ***Conclusion***

Under this approach, the privilege would not survive while a claim is litigated by or against a deceased client's estate. That would be a significant departure from California's longstanding approach. Such a change might well deter clients from candidly communicating with their attorneys, and there has been no demonstrated need for such a departure.

### **Assessment of the Alternatives**

The first alternative, expanding the privilege to apply in the nonprobate context as it does in the probate context, would be consistent with the general policy determination underlying existing law. That is, the privilege would survive until the deceased client's property definitively passes to beneficiaries.

However, it is currently unclear how this alternative could be implemented.<sup>69</sup> Furthermore, existing law under *Moeller v.*

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could not to any substantial degree lessen the encouragement for free disclosure which is the purpose of the privilege.

J. Strong, McCormick on Evidence, § 94, pp. 133-34 (4th ed. 1992).

67. See Evid. Code § 957 & Comment.

68. See Evid. Code §§ 960, 961 & Comments.

69. See discussion "Expand Privilege To Survive Until Nonprobate Assets Definitively Pass to Beneficiaries" *supra*.

*Superior Court* appears to provide for continuation of a deceased trustee's privilege when there is a successor trustee, so long as the confidential communication relates to trust administration. In these specific circumstances, the privilege could continue while surviving claims are resolved against property transferred by revocable living trust, the main alternative to a will. Because this rule provides some degree of protection in the trust context, it appears that the need to expand the posthumous privilege is not as great as it might otherwise be.

Each of the other alternatives depart from the general policy determination underlying existing law. Each of these alternatives has pros and cons. But none of these alternatives appears to be clearly superior to the policy balance struck by existing law. Nor is the Commission convinced that existing law is deterring candid attorney-client communication.

## RECOMMENDATION

After carefully considering several alternatives, the Commission recommends that the Legislature preserve the general approach of existing law. That approach has served the state well for over forty years, and there does not appear to be any clear justification for changing to another approach at this time.

The Commission does, however, recommend minor adjustments to existing law, which are discussed below. These adjustments would be consistent with the general approach of existing law regarding when the privilege should and should not survive.

### **Clarify that an Existing Exception Applies to a Nonprobate Transfer**

Under an existing exception in Evidence Code Section 957, the privilege does not apply after a client's death "as to a communication relevant to an issue between parties all of

whom claim through a deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction when all parties claim through the deceased client.”

The exception is based on the assumption that a decedent would have wanted the attorney-client communication disclosed in litigation between the decedent’s beneficiaries (as opposed to litigation in which a third party, such as a creditor, claims against the decedent). Such disclosure helps to ensure the client’s intent regarding disposition of the client’s assets “might be correctly ascertained and carried out.”<sup>70</sup>

Under the existing language, the exception could be interpreted as excluding a party who claims under a nonprobate transfer.<sup>71</sup> But the rationale for the exception applies not only to beneficiaries under a will, but also with equal force to a person who claims through the decedent by operation of a nonprobate transfer.<sup>72</sup> Accordingly, the Commission recommends clarifying that this exception includes a party claiming under a nonprobate transfer.<sup>73</sup>

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70. Evid. Code § 957 Comment.

71. This could occur if the clause “regardless of whether the claims are by testate or intestate succession or by inter vivos transaction” is read as an exclusive, rather than an illustrative, list.

72. If all parties claim through a nonprobate transfer, there is potentially no probate estate at all. In that case, there would be no personal representative, and no privilege would exist. However, if there is both a probate estate and nonprobate transfer on death, the privilege would continue, and would apply absent an exception or a waiver. If an issue arises in a dispute among the decedent’s beneficiaries, including a nonprobate beneficiary, a narrow reading of the exception could defeat its purpose of ascertaining the decedent’s intentions.

73. See proposed amendment to Evid. Code § 957 *infra*. The Legislature may want to consider making the same revision to analogous exceptions to other privileges. See, e.g., Evid. Code §§ 984 (exception to marital privilege), 1000 (exception to physician-patient privilege), 1019 (exception to psychotherapist-

### Probate Code Section 12252

The Commission also recommends amending Probate Code Section 12252 to clarify the meaning of recent amendments to it.

As discussed above, the amendments may be subject to two different interpretations. Each interpretation results in a different outcome with respect to the duration of the posthumous privilege.<sup>74</sup>

The Commission believes that the amendments were intended merely to clarify that a personal representative who is appointed to perform subsequent estate administration holds the decedent's privilege.

To avoid any uncertainty in meaning, the Commission recommends removing the amendments from Section 12252 and placing the clarification in Evidence Code Section 953(c), which sets forth the general rule that a personal representative holds the decedent's privilege.<sup>75</sup>

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patient privilege). Such changes would be beyond the scope of the current study. See 2007 Cal. Stat. ch. 388, § 2.

74. See discussion of "Recent Amendments to Probate Code Section 12252" *infra*.

75. See proposed amendment to Evid. Code § 953(c) *infra*; proposed amendment to Prob. Code § 12252 *infra*. Although the clarification in Probate Code Section 12252 was specific to the attorney-client privilege, the same principle would seem to apply to any other privilege that may be held by a personal representative. Accordingly, the Legislature may want to consider making a similar revision to those other privileges. See, e.g., Evid. Code §§ 993(c) (physician-patient privilege), 1013(c) (psychotherapist-patient privilege), 1035.4(c) (sexual assault victim-counselor privilege). Such a change would be beyond the scope of the current study. See 2007 Cal. Stat. ch. 388, § 2.

The Commission also considered amending Section 953 to expressly provide that the privilege held by the personal representative is terminated upon final distribution of the estate. However, that rule would be problematic because there are circumstances in which a personal representative may have a duty to perform, in the personal representative's capacity as personal representative, after final distribution of the estate. (For example, in many instances, courts allow the personal representative to retain a substantial reserve after final

## CONCLUSION

The general approach of existing law should be preserved. Under the Evidence Code, the attorney-client privilege survives the client's death while there is a personal representative.<sup>76</sup> And under *Moeller v. Superior Court*, it appears that the attorney-client privilege also survives in some circumstances when there is a successor trustee.

The Commission recommends two minor adjustments that are consistent with the policy balance struck by existing law:

- Clarify that an existing exception in Evidence Code Section 957, which applies when all parties claim through the deceased client, applies when one or more of the parties claims under a nonprobate transfer.
- Clarify that the privilege is held by a personal representative who is appointed for purposes of subsequent estate administration pursuant to Probate Code Section 12252.

The first adjustment would help effectuate a deceased client's intent with respect to a nonprobate transfer, while the second adjustment would help prevent confusion and needless disputes.

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distribution to deal with contingencies, such as an unresolved claim against the estate, including unresolved tax liability. See also *supra* note 20.) The proposed amendment to Section 953 and its Comment underscores that point, indicating that a personal representative holds the decedent's attorney-client privilege at anytime while the personal representative has a duty as personal representative.

76. Evid. Code §§ 953-954 & Comments; *HLC Properties, Ltd. v. Superior Court*, 35 Cal. 4th 54, 65-68, 105 P.3d 560, 24 Cal. Rptr. 3d 199 (2005).

## PROPOSED LEGISLATION

### **Evid. Code § 953. Holder of privilege**

SECTION 1. Section 953 of the Evidence Code is amended, to read:

953. As used in this article, “holder of the privilege” means:

(a) The client when ~~he~~ *the client* has no guardian or conservator.

(b) A guardian or conservator of the client when the client has a guardian or conservator.

(c) The personal representative of the client if the client is dead, *including a personal representative appointed pursuant to Probate Code Section 12252.*

(d) A successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence.

**Comment.** Subdivision (a) of Section 953 is amended to revise a gender reference.

Subdivision (c) is amended to make clear that a personal representative holds the decedent’s lawyer-client privilege at any time while the personal representative has duties as a personal representative, including, without limitation, during any subsequent estate administration. See, e.g., Prob. Code § 12252 (appointment of personal representative for subsequent administration of estate); see also Prob. Code § 58 (personal representative). The personal representative holds the privilege during any action asserted, commenced, continued, or defended by a personal representative. See Code Civ. Proc. §§ 377.30 (commencement of surviving action by personal representative), 377.31 (continuation of surviving action by personal representative), 377.40 (defense by personal representative of surviving action), 377.60 (assertion by personal representative of wrongful death action); Prob. Code §§ 9000-9399 (creditor claims against estate).

**Evid. Code § 957. Parties claiming through deceased client**

SEC. 2. Section 957 of the Evidence Code is amended, to read:

957. There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased client, regardless of whether the claims are by testate or intestate succession, *nonprobate transfer*, or by inter vivos transaction.

**Comment.** Section 957 is amended to clarify that the exception is applicable to parties who all claim through a deceased client, including a person who claims through a nonprobate transfer.

**Prob. Code § 12252. Reappointment of a personal representative**

SEC. 3. Section 12252 of the Probate Code is amended, to read:

12252. If subsequent administration of an estate is necessary after the personal representative has been discharged because other property is discovered, ~~disclosure is sought of a communication that is deemed privileged in the absence of a waiver by a personal representative under Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code,~~ or because it becomes necessary or proper for any other cause, both of the following shall apply:

(a) The court shall appoint as personal representative the person entitled to appointment in the same order as is directed in relation to an original appointment, except that the person who served as personal representative at the time of the order of discharge has priority. ~~The appointed personal representative shall be a holder of the decedent's lawyer-client privilege for purposes of Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code.~~

(b) Notice of hearing of the appointment shall be given as provided in Section 1220 to the person who served as



personal representative at the time of the order of discharge and to other interested persons. If property has been distributed to the State of California, a copy of any petition for subsequent appointment of a personal representative and the notice of hearing shall be given as provided in Section 1220 to the Controller.

**Comment.** Section 12252 is amended to remove language relating to a personal representative holding the attorney-client privilege. That issue is addressed in Evidence Code Section 953.



STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

RECOMMENDATION

## **Revision of No Contest Clause Statute: Conforming Revisions**

February 2009

California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, CA 94303-4739  
[www.clrc.ca.gov](http://www.clrc.ca.gov)

#### NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Revision of No Contest Clause Statute: Conforming Revisions*, 38 Cal. L. Revision Comm'n Reports 203 (2008). This is part of publication #232.

STATE OF CALIFORNIA

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CALIFORNIA LAW REVISION COMMISSION

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February 19, 2009

To: The Honorable Arnold Schwarzenegger  
*Governor of California*, and  
The Legislature of California

Senate Bill 1264 (Harman) was introduced in 2008 to implement a California Law Revision Commission recommendation on the enforcement of no contest clauses. Effective January 1, 2010, that bill repeals the existing no contest clause statute and replaces it with a new statute.

There are a few related statutory provisions that cross-refer to sections that will be repealed.

The Commission recommends that those cross-references be amended to properly reflect the pending change in the law.

This recommendation was prepared pursuant to Resolution Chapter 100 of the Statutes of 2007.

Respectfully submitted,

Pamela L. Hemminger  
*Chairperson*



## REVISION OF NO CONTEST CLAUSE STATUTE: CONFORMING REVISIONS

Senate Bill 1264 (Harman) was introduced in 2008 to implement a Law Revision Commission recommendation on the enforcement of no contest clauses.<sup>1</sup>

The bill was amended in the Assembly to make a substantive change in the law that was not included in the Commission's recommendation: repeal of the sections providing for declaratory relief.<sup>2</sup>

The bill was enacted as so amended,<sup>3</sup> but does not become operative until January 1, 2010.<sup>4</sup>

Before the legislation becomes operative, a small number of technical amendments need to be made to correct cross-references to the declaratory relief provisions. Those conforming revisions are explained below.

### **Need for Conforming Revisions**

There are four code sections that make specific reference to the declaratory relief provisions. Two of the sections provide that the court's determination in a declaratory relief

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1. *Revision of No Contest Clause Statute*, 37 Cal. L. Revision Comm'n Reports 359 (2007). A no contest clause is a provision in a will, trust, or other instrument, which states that a person who contests or attacks the instrument or any of its provisions takes nothing under the instrument or takes a reduced share.

2. Prob. Code §§ 21320-21322. Under those provisions, a beneficiary of an instrument containing a no contest clause can petition the court for a determination of whether a contemplated action would violate the no contest clause.

3. 2008 Cal. Stat. ch. 174.

4. 2008 Cal. Stat. ch. 174, § 3.

proceeding is appealable.<sup>5</sup> Two provide that the statute of limitations is tolled during a declaratory relief proceeding.<sup>6</sup>

Those sections need to be amended in order to correct the cross-references to the declaratory relief provisions, which will be repealed on January 1, 2010.

### **Nature of Conforming Revisions**

Ordinarily, a cross-reference to a repealed provision of law could simply be deleted. That approach is not possible in this instance, because of a complication involving the continued application of former law to some older instruments.

By its terms, the new law has a limited retroactive effect. It applies to any instrument that becomes irrevocable on or after January 1, 2001.<sup>7</sup> The new law does *not* apply to an instrument that became irrevocable before 2001.<sup>8</sup>

Pursuant to the general transitional rule governing the Probate Code, an instrument that is not governed by a new law is instead governed by the former law, notwithstanding the repeal of the former law.<sup>9</sup>

Consequently, an instrument that became irrevocable before 2001 will remain subject to the the declaratory relief provisions (notwithstanding their repeal). For that reason, a beneficiary of such an instrument still has the right to petition for declaratory relief to determine whether a proposed action would violate a no contest clause. Existing law governing

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5. Prob. Code §§ 1303, 1304.

6. Code Civ. Proc. §§ 366.2, 366.3. See also Prob. Code § 21308 (tolling of statute of limitations during declaratory relief).

7. See Prob. Code § 21315.

8. *Id.*

9. See Prob. Code § 3(g) (“If the new law does not apply to a matter that occurred before the operative date, the old law continues to govern the matter notwithstanding its amendment or repeal by the new law.”).



appeals and the tolling of the statute of limitations should continue to apply to those declaratory relief proceedings.

**Recommendation**

The Commission recommends that the sections containing cross-references to the declaratory relief provisions be amended to make clear that they continue to apply to a declaratory relief proceeding, even after the repeal of the declaratory relief provisions. This would preserve the status quo as to instruments that became irrevocable before January 1, 2001, and will therefore be governed by former law.

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## PROPOSED LEGISLATION

### **Code Civ. Proc. § 366.2 (amended). Limitations period for surviving action**

SECTION 1. Section 366.2 of the Code of Civil Procedure is amended to read:

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

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

(1) Sections 12, 12a, and 12b of this code.

(2) Part 4 (commencing with Section 9000) of Division 7 of the Probate Code (creditor claims in administration of estates of decedents).

(3) Part 8 (commencing with Section 19000) of Division 9 of the Probate Code (payment of claims, debts, and expenses from revocable trust of deceased settlor).

(4) *Former* Part 3 (commencing with Section 21300) of Division 11 of the Probate Code (no contest clauses), *as that part read prior to its repeal by Chapter 174 of the Statutes of 2008.*

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

**Comment.** Section 366.2 is amended to reflect the repeal of former Part 3 (commencing with Section 21300) of Division 11 of the Probate

Code. See 2008 Cal. Stat. ch. 174. The reference to the former law is retained because the former law continues to apply to the enforcement of a no contest clause in an instrument that became irrevocable prior to January 1, 2001, notwithstanding the repeal of the former law. See Prob. Code §§ 3(g) (“If the new law does not apply to a matter that occurred before the operative date, the old law continues to govern the matter notwithstanding its amendment or repeal by the new law.”), 21315(b) (new law does not apply to instrument that became irrevocable prior to January 1, 2001). See also former Prob. Code § 21308 (limitations period tolled during declaratory relief proceedings).

**Code Civ. Proc. § 366.3 (amended). Limitations period for action to enforce claim to distribution**

SEC. 2. Section 366.3 of the Code of Civil Procedure is amended to read:

366.3. (a) If a person has a claim that arises from a promise or agreement with a decedent to distribution from an estate or trust or under another instrument, whether the promise or agreement was made orally or in writing, an action to enforce the claim to distribution may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply.

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

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

**Comment.** Section 366.3 is amended to reflect the repeal of former Part 3 (commencing with Section 21300) of Division 11 of the Probate Code. See 2008 Cal. Stat. ch. 174. The reference to the former law is retained because the former law continues to apply to the enforcement of a no contest clause in an instrument that became irrevocable prior to

January 1, 2001, notwithstanding the repeal of the former law. See Prob. Code §§ 3(g) (“If the new law does not apply to a matter that occurred before the operative date, the old law continues to govern the matter notwithstanding its amendment or repeal by the new law.”), 21315(b) (new law does not apply to instrument that became irrevocable prior to January 1, 2001). See also former Prob. Code § 21308 (limitations period tolled during declaratory relief proceedings).

**Prob. Code § 1303 (amended). Appealable orders**

SEC. 3. Section 1303 of the Probate Code is amended to read:

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

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

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

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

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

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

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

(g) Directing distribution of property.

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

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

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

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

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

**Comment.** Section 1303 is amended to reflect the repeal of former Chapter 2 (commencing with Section 21320) of Part 3 of Division 11. See 2008 Cal. Stat. ch. 174. The reference to the former law is retained because the former law continues to apply to the enforcement of a no contest clause in an instrument that became irrevocable prior to January 1, 2001, notwithstanding the repeal of the former law. See Sections 3(g) (“If the new law does not apply to a matter that occurred before the operative date, the old law continues to govern the matter notwithstanding its amendment or repeal by the new law.”), 21315(b) (new law does not apply to instrument that became irrevocable prior to January 1, 2001).

**Prob. Code § 1304 (amended). Appealable orders**

SEC. 4. Section 1304 of the Probate Code is amended to read:

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

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

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

(2) Accepting the resignation of the trustee.

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

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

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

**Comment.** Section 1304 is amended to reflect the repeal of former Chapter 2 (commencing with Section 21320) of Part 3 of Division 11. See 2008 Cal. Stat. ch. 174. The reference to the former law is retained

because the former law continues to apply to the enforcement of a no contest clause in an instrument that became irrevocable prior to January 1, 2001, notwithstanding the repeal of the former law. See Sections 3(g) (“If the new law does not apply to a matter that occurred before the operative date, the old law continues to govern the matter notwithstanding its amendment or repeal by the new law.”), 21315(b) (new law does not apply to instrument that became irrevocable prior to January 1, 2001).

