

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
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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*.

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

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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.¹ 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 instrument² makes a gift to the person who drafted or transcribed the instrument.³ The statutory presumption acts as a supplement to the common law on menace, duress, fraud, and undue influence.⁴ 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 1997,⁵ so that it also applies to a gift made by a “dependent adult”⁶ to that

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."⁷ 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."⁸

The application of the statutory presumption to a care custodian has been criticized as overbroad.⁹ 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.¹⁰ 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.¹¹

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.¹² Clear and convincing evidence is

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

Disqualified Persons

There are four classes of "disqualified persons":

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

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.²⁰

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.²¹
- (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.²²
- (4) The beneficiary is a public entity or tax-exempt nonprofit entity.²³
- (5) The gift is valued at \$3,000 or less, if the estate is valued at \$100,000 or more.²⁴
- (6) The instrument is executed outside of California by a transferor who is not a resident of California at the time of execution.²⁵

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.²⁶

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

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.²⁷

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.²⁸ 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.²⁹

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.³⁰ The factual grounds for

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.³¹ 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.³² 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.³³ If the presumption is not rebutted by the disqualified person, the gift fails.³⁴

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.³⁵

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.³⁶

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

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.³⁷

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).³⁸

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.³⁹ 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.⁴⁰

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.”⁴¹ Such services can include the administration of medicine, cleaning and bandaging injuries, bathing, assisting with the toilet, shopping, cooking, housekeeping, and assisting with finances.⁴²

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.⁴³ 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.⁴⁴

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

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.⁴⁵ 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.⁴⁶

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.⁴⁷

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:⁴⁸

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

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.⁴⁹

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.⁵⁰ 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.”⁵¹ Demonstrated vulnerability of a transferor to such influence can be offered as evidence of undue influence.⁵² 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.

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.⁵³ 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

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.⁵⁴ 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*⁵⁵ 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

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.”⁵⁶ 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 15610.17,⁵⁷ which uses the term in defining those persons who are legally required to report elder abuse.⁵⁸ 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).⁵⁹

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.⁶⁰

Dependent Adult

The care custodian provision only applies if the transferor is a dependent adult.⁶¹ 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.

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.⁶²

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

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.⁶³ This standard would be familiar to estate planners and probate judges, as it is derived from the substantive criteria for appointment of a conservator.⁶⁴

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.⁶⁵

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

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.⁶⁶ 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.⁶⁷

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

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 6112.⁶⁸

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.⁶⁹ 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.⁷⁰
- 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.⁷¹
- The definition of “related by blood and marriage” would be revised to fully harmonize the treatment of spouses and domestic partners.⁷²
- The definition of “cohabitant” would be generalized so that it applies to all uses of the term.⁷³

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.⁷⁴

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.⁷⁵
- The exception for gifts to an “heir”⁷⁶ 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.⁷⁷

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.⁷⁸

Rebuttal of the Presumption

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

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.⁸²

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,⁸³ yet the

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.⁸⁴ 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.⁸⁵

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

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.⁸⁶ The standard borrows concepts from the Rules of Professional Conduct governing attorney conflicts of interest.⁸⁷ 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.⁸⁸ 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.⁸⁹ 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.⁹⁰ Consequently, the only gifts that will fail are gifts to non-heirs. By definition, non-heirs are those persons

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.⁹¹ 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.⁹² 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.⁹³ Those rules are different from the general law governing the time to commence a contest of a will⁹⁴ or trust.⁹⁵

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.”⁹⁶ 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.”⁹⁷

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:

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.”⁹⁸ 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.⁹⁹

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.¹⁰⁰ Those provisions would be consistent with former Probate Code Sections 251-253,¹⁰¹ which were repealed on the recommendation of the Commission in 1982.¹⁰² 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

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.

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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.

”

(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.